

4-15-2023

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Recommended Citation

John Dinan, *The Constitutional Politics of Abortion Policy After Dobbs: State Courts, Constitutions, and Lawmaking*, 84 Mont. L. Rev. 27 (2023).

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THE CONSTITUTIONAL POLITICS OF ABORTION POLICY AFTER *DOBBS*: STATE COURTS, CONSTITUTIONS, AND LAWMAKING

John Dinan*

Abstract: My purpose in this article is to analyze the effects of the U.S. Supreme Court's Dobbs v. Jackson Women's Health Organization (2022) decision on the institutional forums for abortion policymaking. Although one effect is clearly to shift more of the focus of abortion policymaking from the federal to the state level, the ruling's effects go even farther, on account of a distinctive form of constitutional politics at the state level stemming from various features of state courts, constitutions, and lawmaking. Overall, constitutional politics at the state level is less court-centered than at the federal level and places less emphasis on the judiciary as the key decision-making body and offers additional forums and opportunities for shaping abortion policy other than by influencing judicial selection and decision-making. State courts are just as capable as the U.S. Supreme Court of issuing rulings protecting abortion rights and have issued various rulings drawing on state constitutional privacy, natural rights, due process, and equality guarantees to invalidate restrictive abortion policies; however, judges face the electorate on a regular basis in three-quarters of the states and only enjoy life tenure in one state, and in a way that renders state judges less likely to invalidate policies backed by the public and public officials. Additionally, because state constitutional amendment processes are much more accessible than the federal amendment process and are employed on a much more regular basis, efforts to shape the level of protection for abortion rights in states are directed not only toward litigation but also toward enacting amendments, whether by providing more explicit grounding for abortion rights or by limiting state courts' ability to issue rulings protecting abortion rights. A final consequence of shifting authority for abortion policy from the federal to the state level is to increase the role and importance of lawmaking. Aside from enacting appropriations riders limiting federal funding of abortion, Congress has played a relatively limited role in regulating abortion, in part because of limits on congressional authority, but also because of the competitiveness of the two parties nationally and the constraints imposed by supermajority senate rules. State legislatures are generally not encumbered by these constraints; moreover, the availability of direct democratic institutions in nearly half of the states provides an additional vehicle for enacting abortion policies.

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My purpose in this article is to analyze changes in the constitutional politics of abortion policy as a result of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*¹ declaring that the U.S. Constitution does not protect abortion rights.² In focusing on the constitutional politics of abortion policy, I am signaling an intent to analyze the institutional forums where abortion policy is made and the characteristics of policymaking in these institutions. Other analysts are interested in investigating other questions about *Dobbs*, generally focusing on abortion restrictions that are likely to be enacted and the accessibility of abortion in the ruling's aftermath. I am less focused on the substance of abortion policy and more focused on the institutions where abortion policy is made, with a particular interest in identifying institutions that have become more and less important as a result of *Dobbs* and assessing the consequences of these shifts.

A leading effect of *Dobbs* is of course to heighten the importance of state governments in determining the level of protection for abortion rights. Prior to the U.S. Supreme Court's 1973 decision in *Roe v. Wade*, states enjoyed virtually unlimited discretion in regulating abortion. Many states in the pre-*Roe* era maintained longstanding policies banning nearly all abortions except when necessary to preserve the life of the woman. Some states permitted abortions in additional circumstances, and four states updated their laws in the years just prior to *Roe* by allowing abortions for any reason during the first several months of pregnancy.³ Even after *Roe*, states retained a fair amount of discretion in enacting abortion policy. States could decide at what point after fetal viability to ban abortions, with some states choosing to ban abortions as early in a woman's pregnancy as they were permitted to do so by the Court's rulings and other states opting to allow abortions through a later point in pregnancy.⁴ After the U.S. Supreme Court's rulings in 1989 in *Webster v. Reproductive Health Services*⁵ and in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶ states were also free to decide whether to enact a wide range of abortion regulations, including parental consent and notification requirements, waiting-period laws, informed consent rules, and restrictions on public funding of

1. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, slip op. (U.S. June 24, 2022).

2. *Id.* at 5.

3. BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS 74–77 (1993).

4. Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 *PUBLIUS* 27, 32–33 (1990) (discussing state legislative activity in the aftermath of *Roe*); Laurie Sobel, Amrutha Ramaswamy, and Alina Salganicoff, *Abortion at SCOTUS: Dobbs v. Jackson Women's Health*, WOMEN'S HEALTH POLICY tbl. 1 (Kaiser Family Foundation, updated June 17, 2022), <https://perma.cc/Y95E-TQWT> (listing the 50 state policies regarding gestational limits on abortion on the eve of the *Dobbs* decision).

5. 492 U.S. 490 (1989).

6. 505 U.S. 833 (1992).

abortion.⁷ However, *Dobbs* broadened considerably the scope of state policy authority, by holding that the U.S. Constitution provides no barrier against states banning abortion at any point during pregnancy and permitting states to enforce virtually any restrictions they might choose to enact, including a number of restrictions that were unenforceable before *Dobbs*.⁸

Although one effect of *Dobbs* is therefore to shift more of the focus of abortion policymaking from the federal to the state level, the ruling has other consequences for the ways that abortion policy is made. In this article, I focus on three main consequences of shifting the focus of abortion policymaking from the federal to the state level, stemming from distinctive features of state courts, constitutions, and lawmaking. In highlighting these distinctive aspects of constitutional politics in the states, I am building on and contributing to recent analyses demonstrating that the approach to protecting rights at the state level differs significantly from that at the federal level.⁹ Although abortion rights are my focus in this article, the arguments that I advance are also applicable to other rights and cases.

One consequence of *Dobbs* is to redirect from federal to state courts nearly all litigation challenging restrictive abortion policies.¹⁰ State supreme courts are just as capable as the U.S. Supreme Court of issuing rulings protecting abortion rights and have in recent decades drawn on state constitutional privacy, liberty, due process, and equality guarantees to strike down restrictive abortion policies.¹¹ However, state courts are structured differently from federal courts in that judges face the electorate on a regular basis in three-quarters of the states and lack life tenure in all but one state. In part, as a result, state supreme court judges are less inclined than their federal counterparts to invalidate policies backed by the public and public officials, whether abortion policies or other policies.¹² The relatively quick turnover in the membership of state courts as a result of these selection and retention processes also leads to more rapid change in the ideological composition of state courts compared with the U.S. Supreme Court and creates

7. Mary C. Segers & Timothy A. Byrnes, *Introduction: Abortion Politics in American States*, in *ABORTION POLITICS IN AMERICAN STATES* 1, 10–11 (Mary C. Segers & Timothy A. Byrnes eds., 1995).

8. *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, slip op. at 77 (U.S. June 24, 2022).

9. See Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853 (2022) (showing that individual rights at the state level have generally not been understood as constraining popular majorities), and Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629 (2010) (focusing on rights of same-sex couples and noting that judicial elections, constitutional amendment processes, and direct democratic institutions all exert influences on state court decision-making in this area).

10. See *infra* § I.

11. See *infra* § I-A.

12. See *infra* § I-B.

a greater risk that rights-protective state court rulings will be reversed by a future state court.¹³

A second distinctive feature of state constitutional politics is that groups and officials seeking to influence the level of protection for abortion rights have another viable option aside from securing favorable court rulings. They can amend the state constitution by making use of amendment processes that are much more accessible at the state level than at the federal level and are employed on a regular basis to adjust levels of protection for rights, whether abortion rights or other rights.¹⁴ On one hand, the accessibility of state amendment processes offers another avenue for groups working to expand protection for abortion rights by enabling passage of amendments providing more explicit textual grounding for these rights. On the other hand, the amendment process can also serve as a vehicle for limiting state courts' ability to interpret state constitutions as protecting abortion rights. The key point is that efforts to influence the level of protection for rights at the state level take place not only by filing lawsuits but also by enacting constitutional amendments in a way that does not occur at the federal level.

Lawmaking processes also differ at the state and federal level. Much of abortion policymaking at the state level takes place through legislative action—and in some states through direct democratic devices—in contrast with the relative absence of congressional legislation regarding abortion.¹⁵ Congress has enacted some abortion-related statutes, including a number of appropriation riders limiting federal funding of abortion as well as a statute banning a late-term abortion procedure among several other statutes.¹⁶ However, Congress is constrained in the policies it can enact regarding abortion, in a way that states are not similarly constrained. Congress can only act pursuant to its delegated powers, and it is uncertain whether these powers are broad enough to authorize a nationwide policy regulating abortion. By contrast state legislatures possess plenary power and do not encounter similar concerns.¹⁷ Congressional lawmaking regarding abortion is also limited because the parties are evenly matched at the federal level, frequently resulting in divided control of the presidency and congress. The majority party usually enjoys only a slight advantage, well short of the support needed to overcome the senate's 60-vote rule for advancing most legislation. By contrast, in most states, one party enjoys such an overwhelming advantage that it can enact policies over the objections of the minority

13. *Id.*

14. *See infra* § II.

15. *See infra* § III.

16. *See infra* p. 39, nn. 180–84 and accompanying text.

17. *See infra* § III-A.

party, especially because most state legislatures operate under majoritarian rules that do not permit minority obstructionism.¹⁸ Additionally, nearly half of the states provide for direct democratic institutions that help overcome legislative intransigence.¹⁹

The ultimate benefit of this analysis is to take stock of the consequences of *Dobbs* for the institutional forums where abortion policymaking takes place and to show that the effects are greater than simply shifting the focus from the federal to the state level. In addition to affecting federalism, by shifting policy authority from the federal government to the 50 state governments, the Court's ruling also affects the separation of powers, by expanding the range of governing institutions where groups and officials can shape abortion policy in meaningful ways.²⁰ At the federal level, efforts to shape abortion policy focus primarily on influencing selection of judges. Groups focus on gaining control of the presidency and senate with an eye to filling vacancies on the Court with favorably disposed Justices and then generating cases that give the Justices an opportunity to produce precedent-shifting rulings.²¹ When policy authority shifts to the state level, additional opportunities emerge for shaping abortion policy—not only influencing judicial selection and decision-making but also determining whether to retain judges, adopting constitutional amendments, and enacting statutes, whether via the legislature or initiative and referenda. Shifting policy authority to the states and channeling political activity to these institutional venues also results in policy generally being made in a more majoritarian fashion, because the public has more direct opportunities to participate directly in state judicial processes, constitutional amendment processes, and lawmaking processes and because these processes are less likely than at the federal level to rely on super-majoritarian rules or produce counter-majoritarian outcomes.²²

I. STATE COURTS

A leading consequence of the Supreme Court's *Dobbs* decision is to shift most abortion-related litigation from federal to state courts. Federal lawsuits can and will continue to be filed. In the months after *Dobbs*, the Biden administration turned to the federal courts to challenge restrictive state abortion laws on the ground that they violate federal statutory protec-

18. See *infra* § III-B, C.

19. See *infra* § III-B, C, D.

20. See *infra* § IV-A.

21. Mark Tushnet, *Social Movements and the Constitution*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 249, 249–51 (Mark Tushnet et al. eds., 2015).

22. See *infra* § IV-B.

tions.²³ In turn, and in response to the Biden administration's executive actions, state attorneys general filed federal lawsuits seeking to prevent the Biden administration from relying on federal statutes to limit state authority in this area.²⁴ However, by declaring in *Dobbs* that the U.S. Constitution does not protect a right to abortion, the U.S. Supreme Court brought a halt to most federal litigation in this area, especially constitutional litigation, thereby ensuring that state courts will be the primary forum for hearing challenges to abortion policies. On one hand, this presents an opportunity for state courts to issue decisions interpreting state constitutions as protecting abortion rights, thereby filling the gap left by the U.S. Supreme Court's retreat from this area, just as state courts have in other areas expanded protection for rights beyond what the U.S. Supreme Court has been prepared to guarantee.²⁵ At the same time, various features of state court selection and retention processes reduce the prospects that many state courts will take advantage of these opportunities, at least to the same extent as the U.S. Supreme Court.

A. State Courts and Protection of Abortion Rights

In considering challenges to restrictive abortion policies, state courts can draw on a wide range of state constitutional provisions to anchor rulings protecting abortion rights. At the time that *Dobbs* was decided, no state constitution contained language explicitly protecting a right to abortion or reproductive autonomy. However, some state constitutions contain explicit guarantees of privacy. Additionally, a number of state constitutions include provisions protecting natural rights. Meanwhile, most state constitutions contain due process and equal protection guarantees, often framing them in ways that do not track corresponding federal guarantees and therefore present fertile opportunities for independent state court interpretation.

State supreme courts in 14 states—Alaska, Arizona, California, Florida, Iowa, Kansas, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Tennessee, Washington, and West Virginia—have at various times drawn on state constitutional guarantees to invalidate restrictive abortion

23. The Biden administration challenged an Idaho law on the ground that it is in part inconsistent with, and thereby preempted by, the federal Emergency Medical Treatment and Active Labor Act (EMTALA). *Justice Department Sues Idaho to Protect Reproductive Rights*, U.S. DEP'T OF JUST. (Aug. 2, 2022), <https://perma.cc/5WXF-MDK4>.

24. Texas filed a federal lawsuit seeking and securing a preliminary injunction preventing the U.S. Department of Health and Human Services from interpreting the EMTALA to override state policies restricting abortion. *Texas v. Becerra*, No. 5: 22C V185H, 2022 U.S. Dist. LEXIS 151142 at *14, 88 (N.D. Tex. August 23, 2022).

25. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW, 1–2 (2018).

policies.²⁶ State supreme courts have been particularly active in invalidating or enjoining enforcement of state policies restricting funding for abortions pursuant to the federal-state Medicaid program.²⁷ State courts have also invalidated parental consent and notification rules,²⁸ as well as policies requiring waiting periods before abortions can be performed and informed-consent policies stipulating that women be provided certain information

26. A particularly helpful article compiling state supreme court rulings protecting abortion rights is Robert L. Bentlyewski, *Abortion Rights Under State Constitutions: A Fifty-State Survey*, 90 *FORDHAM L. REV.* 201 (2021). Another valuable resource is *State Constitutions and Abortion Rights*, CENTER FOR REPRODUCTIVE RIGHTS (July 2022), <https://perma.cc/W76G-FDZT>. It should be noted that Bentlyewski in his review of court rulings discusses a pre-*Roe* ruling of the Vermont Supreme Court, *Beecham v. Leahy*, 287 A.2d 836 (Vt. 1972), that could be considered to have identified a state constitutional right to abortion. However, as Bentlyewski also notes, other commentators have rejected this interpretation of the Vermont Supreme Court opinion. *Id.* at 212. Bentlyewski also discusses a Mississippi Supreme Court ruling that recognized that the Mississippi Constitution, and particularly language in the state constitution that is equivalent to the Ninth Amendment of the U.S. Constitution, guarantees a right to abortion. But in that case, the Court concluded that each of the challenged provisions could nevertheless withstand scrutiny. *Pro-Choice Mississippi v. Fordice*, 716 So. 2d 645 (Miss. 1998). I therefore do not include the Mississippi Supreme Court in this list of state supreme courts that have invalidated restrictive abortion policies, because the policies in this case were sustained. Finally, Bentlyewski notes that the New York Court of Appeals, in *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994), concluded that the New York Constitution protects a right to abortion, but the Court in that case upheld the state policy at issue against claims that the policy violated this right. The key point, to sum things up, is that to ask which state supreme courts have drawn on state constitutional provisions to invalidate abortion policies, which is the question I pose in this section, is different from asking which state supreme courts have interpreted their state constitutions as recognizing a right to abortion, which is a question that some other scholars and commentators have posed and that would add several other state supreme courts to the list I have compiled, in particular by adding the highest courts of Mississippi and New York.

27. See *State Department of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 905 (Alaska 2001) (invalidating a policy restricting public funding of abortions); *Alaska v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 988 (Alaska 2019) (invalidating a statute restricting public funding of abortions); *Simat Corp. v. Arizona Health Care Cost Containment*, 56 P.3d 28, 29 (Ariz. 2002) (invalidating a policy restricting public funding of abortions); *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 781 (Cal. 1981) (invalidating a ban on public funding of abortions); *Right to Choose v. Byrne*, 450 A.2d 925, 937 (N.J. 1982) (invalidating a law restricting public funding of abortions); *Moe v. Sec'y of Admin. and Fin.*, 417 N.E.2d 387, 390 (Mass. 1981) (invalidating a policy restricting public funding of abortions); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995) (invalidating a law restricting public funding of abortions); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 844 (N.M. 1998) (invalidating a policy restricting public funding of abortions); *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993) (invalidating a policy restricting public funding of abortions).

28. *Alaska v. Planned Parenthood of Alaska*, 171 P.3d 577, 579 (Alaska 2007) (invalidating a parental-consent requirement); *Planned Parenthood of the Great Northwest v. Alaska*, 375 P.3d 1122, 1128 (Alaska 2016) (invalidating a parental notification requirement); *Am. Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 800 (Cal. 1997) (invalidating a parental-consent requirement); *In re T. W.*, 551 So.2d 1186, 1188 (Fla. 1989) (invalidating a parental-consent requirement); *N. Florida Women's Health v. Florida*, 866 So.2d 612, 615 (Fla. 2003) (invalidating a parental-notification requirement); *Planned Parenthood League of Massachusetts v. Attorney General*, 677 N.E.2d 101, 109 (Mass. 1997) (permanently enjoining enforcement of a portion of a parental-consent law); *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620, 638–39 (N.J. 2000) (invalidating a parental-notification law); *Washington v. Koome*, 530 P.2d 260, 263 (Wash. 1975) (en banc) (invalidating a parental-consent requirement).

before undergoing abortions.²⁹ Other state court decisions have overturned policies barring certain types of abortion procedures,³⁰ as well as policies restricting the facilities where abortions can be performed or the medical professionals who can perform them.³¹

In issuing these rulings, state courts have at times drawn support from state constitutional provisions protecting privacy. Although the U.S. Constitution makes no mention of privacy, eleven state constitutions contain language explicitly protecting privacy.³² In a half-dozen states with explicit privacy guarantees, these protections are embedded in provisions protecting against unreasonable search and seizure,³³ or framed in ways that signal a connection with search and seizure,³⁴ or focus specifically on personal data and information.³⁵ However, a handful of state constitutions, in Alaska,³⁶

29. *Gainesville Women's Care, LLC v. Florida*, 210 So.3d 1243 (Fla. 2017) (enjoining enforcement of a waiting-period requirement, but after further court proceedings this requirement was eventually permitted to be enforced, Order Granting Defendants' Motion For Summary Final Judgment at 21, *Gainesville Women's Care, LLC v. Florida*, <https://perma.cc/UN2T-JCWL> (Fla. Cir. Ct. April 8, 2022) (No. 2015-CA-1323)); *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 212 (Iowa 2018) (invalidating a waiting-period requirement); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 3–4 (Tenn. 2000) (invalidating various restrictions, including an informed-consent requirement and waiting-period requirement).

30. *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (invalidating a ban on a second-term abortion procedure).

31. *Armstrong v. State*, 989 P.2d 364, 384 (Mont. 1999) (invalidating a law holding that abortions can only be performed by licensed physicians); *Weems v. State*, 440 P.3d 4, 13–14 (Mont. 2019) (enjoining enforcement of a law restricting the medical professionals who can perform abortions); *Planned Parenthood of Middle Tennessee*, 38 S.W.3d at 25 (invalidating various restrictions, including a requirement that abortions in the second trimester take place in a hospital).

32. *Privacy Protections in State Constitutions*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 3, 2022), <https://perma.cc/U3UJ-FC7D>.

33. ILL. CONST., art. I, § 6 (“The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.”) (emphasis added); LA. CONST., art. 1, § 5 (“Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”) (emphasis added); and S.C. CONST., art. 1, § 10 (“The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained.”) (emphasis added).

34. See the identical language found in the WASH. CONST., art. 1, § 7, and ARIZ. CONST., art. 2, § 8, to the effect that: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

35. N.H. CONST. Pt. 1, art. II: “An individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.”

California,³⁷ Florida,³⁸ Hawaii,³⁹ and Montana,⁴⁰ contain provisions guaranteeing a right to privacy that is untethered to search and seizure or personal data and information.⁴¹ Montana's privacy guarantee, adopted as part of a constitutional revision that produced the state's current 1972 constitution, is typical of this final group of privacy provisions, declaring, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."⁴² At various times in the decades prior to *Dobbs*, supreme courts in Alaska,⁴³ California,⁴⁴ Florida,⁴⁵ and Montana⁴⁶ relied on state constitutional privacy guarantees in striking down or enjoining enforcement of restrictive abortion policies.

36. ALASKA CONST., art. 1, § 22 ("The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.")

37. CAL. CONST., art. 1, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.")

38. FLA. CONST., art. 1, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.")

39. HAW. CONST., art. 1, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.")

40. MONT. CONST., art. II, § 10.

41. These five privacy provisions were all added between 1972 and 1980. Amendments in Alaska and California added privacy guarantees to those states' constitutions in 1972. A new Montana constitution written by a constitutional convention and approved by voters in 1972 included a privacy provision. Hawaii's privacy provision was also crafted by a constitutional convention and approved by voters in 1978. Florida's privacy provision was adopted in 1980 via a legislature-referred amendment approved by voters. JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* 88 (2018). It should be noted that two of the five state constitutions with privacy provisions of this kind—Florida and Hawaii—also contain separate search-and-seizure provisions that also mention privacy. *See* FLA. CONST., art. 1, § 12; HAW. CONST., art. I, § 7.

42. MONT. CONST., art. II, § 10.

43. *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963, 965 (Alaska 1997) (preventing a hospital from declining to perform elective abortions); *Alaska v. Planned Parenthood of Alaska*, 171 P.3d 577, 585 (Alaska 2007) (invalidating a parental-consent requirement).

44. *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 781 (Cal. 1981) (invalidating a restriction on public funding of abortions); *Am. Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 831 (Cal. 1997) (invalidating a parental-consent requirement).

45. *In re T. W.*, 551 So.2d 1186, 1188 (Fla. 1989) (invalidating a parental-consent requirement); *N. Florida Women's Health v. Florida*, 866 So.2d 612, 639–40 (Fla. 2003) (invalidating a parental-notification requirement); *Gainesville Women's Care, LLC v. Florida*, 210 So.3d 1243, 1264 (Fla. 2017) (enjoining enforcement of a waiting-period requirement, but after further court proceedings this requirement was eventually permitted to be enforced, *Order Granting Defendants' Motion For Summary Final Judgment at 21, Gainesville Women's Care, LLC v. Florida*, <https://perma.cc/UN2T-JCWL> (Fla. Cir. Ct. April 8, 2022) (No. 2015-CA-1323)).

46. *Armstrong v. State*, 989 P.2d 364, 384 (Mont. 1999) (invalidating a law holding that abortions can only be performed by licensed physicians); *Weems v. State*, 440 P.3d 4, 13–14 (Mont. 2019) (enjoining enforcement of a law restricting the medical professionals who can perform abortions).

In issuing decisions overturning restrictive abortion policies, state supreme courts have occasionally relied on state constitutional provisions protecting natural rights. In siding with challenges to restrictive abortion policies, supreme courts in Kansas,⁴⁷ New Jersey,⁴⁸ and West Virginia⁴⁹ each drew in part on natural rights guarantees that resemble language in the Declaration of Independence but have no counterpart in the U.S. Constitution. A clause in the Kansas bill of rights is typical of these natural rights guarantees that are occasionally invoked in state court decisions striking down abortion restrictions. Kansas's provision declares that "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."⁵⁰ A provision in West Virginia's bill of rights is even more expansive, declaring that:

All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: [t]he enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.⁵¹

State supreme court rulings invalidating restrictive abortion policies have also drawn on state due process clauses or equivalent guarantees. In issuing rulings of this kind, state supreme courts in Massachusetts,⁵² Minnesota,⁵³ Tennessee,⁵⁴ Washington,⁵⁵ and West Virginia⁵⁶ have each relied, in part, on state constitutional clauses prohibiting deprivation of liberty

47. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 502–03 (Kan. 2019) (invalidating a ban on a second-term abortion procedure).

48. *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) (invalidating a law restricting public funding of abortions); *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620, 638–39 (N.J. 2000) (invalidating a parental-notification law). The New Jersey Supreme Court drew in these rulings on a natural rights guarantee in the New Jersey Constitution; however, the Court interpreted this natural-rights language as guaranteeing "equal protection." As the Court wrote in *Byrne*: "In New Jersey, equal protection of the laws is assured not only by the Fourteenth Amendment to the United States Constitution, but also by Art. I, par. 1 of the state Constitution." 450 A.2d at 934. As the Court also noted, "In more expansive language than that of the United States Constitution, Art. I, par. 1 of the New Jersey Constitution provides: 'All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.'" *Id.*

49. *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993) (invalidating a policy restricting public funding of abortions).

50. KAN. CONST., Bill of Rights, § 1.

51. W. VA. CONST., art. III, § 1.

52. *Moe v. Sec'y of Admin. and Fin.*, 417 N.E.2d 387, 390 (Mass. 1981) (invalidating a policy restricting public funding of abortions); *Planned Parenthood League of Mass. v. Attorney General*, 677 N.E.2d 101, 109 (Mass. 1997) (permanently enjoining enforcement of a portion of a parental-consent law).

53. *Women of Minn. v. Gomez*, 542 N.W.2d 17, 19 (Minn. 1995) (invalidating a law restricting public funding of abortions).

54. *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 25 (Tenn. 2000) (invalidating various restrictions, including an informed-consent requirement, waiting-period requirement, and a requirement that abortions in the second trimester take place in a hospital).

without due process or according to the law of the land. In some cases, these state guarantees are framed in language that is very similar to the language found in the due process clauses in the U.S. Constitution,⁵⁷ but in other cases, these state guarantees are framed quite differently than the due process clauses in the U.S. Constitution.⁵⁸

At times, state supreme courts have invalidated abortion policies on the ground that they violate state constitutional provisions requiring uniform or equal treatment of citizens or explicitly prohibiting discrimination on the basis of sex. Nearly half of the states have adopted equal rights amendments (ERAs) explicitly barring discrimination on the basis of sex.⁵⁹ Notably, though, New Mexico's Supreme Court is the only state supreme court to rely on a state ERA to invalidate restrictive abortion policies.⁶⁰ State supreme courts that have grounded their abortion-rights rulings in equality guarantees have instead generally relied on other equality clauses, such as provisions requiring equal privileges or immunities for all citizens. The Alaska,⁶¹ Arizona,⁶² Iowa,⁶³ and Washington⁶⁴ supreme courts relied on language of this sort to invalidate restrictive abortion policies, such as when Iowa's supreme court invalidated a waiting-period requirement by drawing on language in that state's constitution stipulating: "All laws of a general nature shall have a uniform operation; the general assembly shall

55. *Washington v. Koome*, 530 P.2d 260, 263 (Wash. 1975) (en banc) (invalidating a parental-consent requirement).

56. *Women's Health Ct. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 663–64, 667 (W. Va. 1993) (invalidating a policy restricting public funding of abortions).

57. *See, e.g.*, MINN. CONST., art. I, § 7 ("No person shall be held to answer for a criminal offense without due process of law, . . . nor be deprived of life, liberty or property without due process of law.").

58. *See, e.g.*, TENN. CONST., art. I, § 8 ("That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.").

59. DINAN, *supra* note 41, at 81 (noting in 2018 that 22 state constitutions contain equal rights amendments barring discrimination on the basis of sex). In 2019, Delaware became the 23rd state to adopt a constitutional guarantee of this kind. *See* 52 THE COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 4, tbl. 1.2 (2020).

60. *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 844 (N.M. 1998) (invalidating a policy restricting public funding of abortions).

61. *Alaska v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001) (invalidating a policy restricting public funding of abortions); *Planned Parenthood of the Great Northwest v. Alaska*, 375 P.3d 1122, 1128 (Alaska 2016) (invalidating a parental notification requirement); *Alaska v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 988 (Alaska 2019) (invalidating a statute restricting public funding of abortions).

62. *Simat Corp. v. Arizona Health Care Cost Containment*, 56 P.3d 28, 32–33 (Ariz. 2002) (invalidating a policy restricting public funding of abortions).

63. *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 237 (Iowa 2018) (invalidating a waiting-period requirement).

64. *Washington v. Koome*, 530 P.2d 260, 266 (Wash. 1975) (en banc) (invalidating a parental-consent requirement).

not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”⁶⁵

Although state supreme courts have not yet drawn on various other state constitutional provisions when invalidating restrictive abortion policies, lower state judges have considered the possibility that other state guarantees can furnish protection for abortion rights and in ways that could be endorsed by state high courts in future cases. In Wyoming, for instance, in issuing a post-*Dobbs* ruling enjoining enforcement of a recently enacted state law banning nearly all abortions,⁶⁶ a state district judge relied in part on a provision in the Wyoming Constitution guaranteeing that “Each competent adult shall have the right to make his or her own health care decisions.”⁶⁷

B. State Judicial Selection and Retention Processes and State Court Decision-Making

Although shifting the focus of abortion litigation from the U.S. Supreme Court to state supreme courts presents opportunities for state judges to step into the breach and issue rulings protecting abortion rights, the structure of state judicial selection and retention processes limits the prospects that state judges will take advantage of these opportunities. A few states follow the federal approach to selection and retention where the executive and legislature select judges who serve for life or until retirement age. However, the vast majority of states structure these processes in ways that differ from the federal approach.

Cataloging and categorizing state court selection and retention systems is not easy.⁶⁸ States rely on a wide range of mechanisms at various stages of the selection and retention process. Moreover, some states rely on mechanisms that do not fit neatly in particular categories. States also adjust their processes on a somewhat regular basis, with several states changing systems just in the last decade.⁶⁹ It is also important to stress that many state

65. *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 244 (Iowa 2018) (citing IOWA CONST., art. I, § 6).

66. The ruling is discussed at Mead Gruver, *Abortion to remain legal in Wyoming while lawsuit proceeds*, ASSOCIATED PRESS (Aug. 10, 2022), <https://perma.cc/F2QL-NDMA>.

67. WYO. CONST., art. I, § 38(a); *Johnson v. State of Wyoming*, 2022 WL 3009976 (Wyo. Dist.).

68. These challenges, especially the challenges of classifying state selection systems, are set out in a particularly helpful way in Greg Goelzhauser, *Classifying Judicial Selection Institutions*, 18 STATE POL. & POL’Y Q. 174 (2018).

69. West Virginia switched from partisan elections to non-partisan elections. North Carolina switched from non-partisan elections to partisan elections. Chris W. Bonneau and Jenna Becker Kane, *Proposals for Reform: Successes and Failures*, in JUDICIAL ELECTIONS IN THE 21ST CENTURY 249, 250–52 (Chris W. Bonneau and Melinda Gann Hall, eds., 2017). Tennessee in 2014 changed its judicial selection system to provide that the initial selection of state supreme court judges shall be made by the governor, subject to confirmation by both houses of the state legislature. Prior to this time the legislature

supreme court vacancies that occur in the middle of a term are filled through special processes (often by the governor filling the vacancy) that differ from the usual processes for filling open seats at the end of a judge's term. Nevertheless, it is possible to advance some general conclusions about how states select and retain supreme court judges.

One group of states relies primarily on competitive elections, with some states listing judicial candidates' partisan affiliation on the ballot and other states declining to do so.⁷⁰ Currently, seven states (Alabama, Illinois, Louisiana, North Carolina, Ohio, Pennsylvania, and Texas) generally select supreme court judges via partisan elections.⁷¹ These states also choose generally, but not always, to rely on partisan elections to renew judges' terms.⁷² Another fourteen states select (and generally renew) judges' terms via non-partisan elections: Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Oregon, Washington, West Virginia, and Wisconsin.⁷³

Seventeen states rely on a Missouri-plan whose distinctive feature is that judges are initially appointed but stand for periodic retention elections if they wish to extend their time on the bench. The states following this approach are Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming.⁷⁴ In most of these states, a nominating commission generally submits a list of potential nominees to the

did not have a role in confirming Tennessee judges. William E. Raftery, *Trends in Judicial Selection Methods*, 100 *JUDICATURE* 12, 13 (2018).

70. The information in this section and data regarding the number of states relying on each approach to judicial selection are drawn from *Judicial Selection: An Interactive Map*, BRENNAN CENTER FOR JUSTICE, <https://perma.cc/N2DN-A25P>.

71. During the time covered in this study, West Virginia, which is not included in the list of seven states currently holding partisan elections, did hold partisan elections up until 2015, but then switched to hold non-partisan elections after that time. Also, North Carolina, which is currently included in the count of seven states holding partisan elections, has at various times during this period held partisan elections (through 2002 and then from 2018 onward) and non-partisan elections (from 2004 through 2016). Finally, Ohio is included in the count of seven states holding partisan elections, but prior to 2022, judges in Ohio were nominated in party nomination processes before competing in the general election on a non-partisan ballot. As of 2022, judges in Ohio are now listed with their party affiliation on the general-election ballot. *Judicial Selection: An Interactive Map*, *supra* note 70.

72. In Illinois and Pennsylvania, judges are initially selected in partisan elections, but when it comes time to renew their terms, the judges stand for retention elections. *Id.*

73. In addition to the points already made about West Virginia holding non-partisan elections only from 2015 onward, North Carolina holding non-partisan elections from 2004–2016, and Ohio holding nominally non-partisan elections through 2020, it should also be noted that Michigan is included in the count of 14 states currently holding non-partisan elections, following general practice, but it should be stressed that judges in Michigan are initially nominated via party nomination processes before competing in the general election on a non-partisan ballot. *Id.*

74. *Id.*

governor, who selects a judge from this list.⁷⁵ Nearly all of these states provide that after a period of time has elapsed after their initial appointment, judges stand for retention elections where voters consider whether to keep them in office for another term.⁷⁶

Twelve states do not hold judicial elections, preferring to rely on gubernatorial selection or, in two cases, legislative selection, for appointing and reappointing judges. Ten of these states—Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont—generally follow the federal model of judicial selection.⁷⁷ In these states, the governor selects judges, sometimes drawing from a list of names submitted by a commission but in other cases without regard to a commission.⁷⁸ The governor's nominee then has to be confirmed by some other body, whether the senate, both legislative chambers, or a council.⁷⁹ States relying on gubernatorial appointment vary in regard to how judges are reappointed. In several of these states, judges serve for life or until retirement age. In most other states, judges are reappointed through the same process or a roughly similar process (in Hawaii, for instance, a commission makes the reappointment decision) as was used for their initial appointment.⁸⁰ Finally, in two states that eschew reliance on any form of judicial elections (Virginia and South Carolina), legislators are solely responsible for appointing and renewing the terms of judges.⁸¹

States also vary regarding judges' length of service.⁸² Rhode Island is the only state where judges enjoy life tenure.⁸³ Judges in New Hampshire and Massachusetts serve until reaching a retirement age of 70.⁸⁴ In New Jersey, judges serve an initial seven-year term, and if they are reappointed,

75. In California, this process is reversed, in that the governor selects a judge, who then must be approved by a merit commission. In Tennessee, the governor's initial appointment must be approved by the house and senate. *Id.*

76. In New Mexico, judges who are initially appointed to the state supreme court compete in partisan elections at the first general election after their initial appointment. For all subsequent reappointments, judges stand for retention elections. *Id.*

77. *Id.*

78. See *Assisted appointment (judicial selection)*, BALLOTPEdia, <https://perma.cc/XN93-98KV> and *Gubernatorial appointment of judges*, BALLOTPEdia, <https://perma.cc/QQV2-6YCE>.

79. *Gubernatorial appointment of judges*, *supra* note 78.

80. *Methods of Judicial Selection*, AMERICAN JUDICATURE SOCIETY, <https://perma.cc/F3UA-DS9Y>. Hawaii's retention method is discussed at: *Judicial Selection in the States: Hawaii*, AMERICAN JUDICATURE SOCIETY, <https://perma.cc/K5FL-EF2J>.

81. *Judicial Selection in the States: Virginia*, AMERICAN JUDICATURE SOCIETY, <https://perma.cc/5G7W-EFU8>; *Judicial Selection in the States: South Carolina*, AMERICAN JUDICATURE SOCIETY, <https://perma.cc/SFF4-KJMA>.

82. The information in this paragraph is drawn from *Length of terms of state supreme court justices*, BALLOTPEdia, <https://perma.cc/RU48-UR54>.

83. *Id.*

84. *Id.*

then they remain on the bench until reaching a retirement age of 70.⁸⁵ In every other state, judges serve fixed but renewable terms, ranging from six-year terms in a number of states to 14-year terms in New York.⁸⁶

These differences between state and federal selection and retention processes render state judges less inclined than their federal counterparts to invalidate policies supported by the public and public officials, whether abortion policies or other policies. To be sure, scholars have raised important questions about whether and how often the U.S. Supreme Court actually issues counter-majoritarian rulings that are out of step with the national governing coalition. Robert A. Dahl argued in a seminal article in the mid-20th century that the judicial appointment process will, over time, eventually bring U.S. Supreme Court Justices into alignment with the governing majority and in a way that reduces the prospects that the U.S. Supreme Court will act independently of the current governing coalition on consequential policy issues. Dahl concluded that:

[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently, it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.⁸⁷

However, other scholars who have considered these claims, while not necessarily disagreeing with the broad thrust of Dahl's arguments, have concluded that Dahl "underestimated the extent to which a politically appointed Court would strike down laws of Congress," as Keith E. Whittington wrote after undertaking a comprehensive study of U.S. Supreme Court decisions reviewing congressional statutes.⁸⁸ As Whittington noted: "The Court has been willing and able to exercise independent judgment in defining and enforcing constitutional limits on congressional power."⁸⁹ Even if we acknowledge that the extent of U.S. Supreme Court independence can be overstated and that Justices operate within political constraints, the structure of the respective court systems nevertheless puts U.S. Supreme Court Justices in a better position than state supreme court judges to invalidate policies backed by the public and public officials.

In the most comprehensive study of state court decision-making undertaken to date, James L. Gibson and Michael J. Nelson concluded that: "The ideological orientation of the state supreme courts is closely related to both

85. *Id.*

86. *Id.*

87. Robert A. Dahl, *Decision-Making in a Democracy*, 6 J. PUB. L. 279, 285 (1957).

88. KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* 288–89 (2019).

89. *Id.* at 289.

public opinion in the state and party control of the state government.”⁹⁰ As a result, “state supreme courts strongly reflect the political makeup of the states in which they function.”⁹¹ This congruence of state court membership and the state governing majority is generally reflected in state court decisions, which, as Gibson and Nelson write, “tend to be congruent with the mass public’s preferences” in such a way that “courts are basically reflective of and not too far out of step with public preferences in their decisions.”⁹²

Although state supreme court decisions are generally aligned with the views of the public and public officials, differences among states’ selection and retention processes lead some state courts to be especially hesitant to invalidate policies supported by the public, whereas courts in other states are somewhat more inclined to act independently. A key consideration affecting the degree of state court independence is whether judges compete in partisan or non-partisan elections, participate in unopposed retention elections, or do not stand for election at all.⁹³ The importance of selection and retention processes in shaping the degree of state court independence has been demonstrated in analyses of state court decision-making generally⁹⁴ and analyses of abortion rulings in particular.⁹⁵

When judges are chosen in partisan or non-partisan elections, state supreme courts are particularly likely to be ideologically congruent with the state’s governing majority. As Paul Brace, Melinda Gann Hall, and Laura Langer concluded in a 1999 study of state court decision-making in abortion cases, “Judges selected and retained in regular election systems are, as expected, significantly . . . less likely to overturn statutes than judges from merit systems.”⁹⁶

90. JAMES L. GIBSON & MICHAEL NELSON, *JUDGING INEQUALITY: STATE SUPREME COURTS AND THE INEQUALITY CRISIS* 186 (2022).

91. *Id.*

92. *Id.* at 231.

93. *Id.*

94. For a study focusing on state court rulings in death-penalty cases, see Paul L. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206 (1997).

95. For studies focusing on state court rulings regarding abortion policies, see Paul Brace et al., *Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts*, 62 ALB. L. REV. 1265 (1999); Richard P. Caldarone et al., *Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions*, 71 J. OF POL. 560 (2009); Brandice Canes-Wrone et al., *Judicial Independence and Retention Elections*, 28 J. L. ECON. & ORG. 211 (2012).

96. Brace et al., *supra* note 95. This conclusion was also supported in a study of state court decision-making in death-penalty cases. See Brace & Hall, *supra* note 94, at 1219–21. It should be noted that in another study focusing on abortion cases and analyzing the degree to which state court rulings are congruent with public opinion, scholars made a distinction between different types of competitive elections and found that judges who run in non-partisan elections are even more likely than judges who run in partisan elections to issue rulings congruent with public opinion. Caldarone et al., *supra* note 95, at 568.

A key reason why state courts where judges are selected via partisan or non-partisan elections are often closely aligned with the views of the public and public officials is because judges running in competitive elections, especially partisan elections, are defeated on a routine basis and certainly much more often than judges running in retention elections.⁹⁷ This can lead, indirectly, to courts in states with competitive elections issuing decisions that align with public opinion, because more rapid turnover in state courts' composition leads to a tighter ideological fit, and less disjunction, between the court and the governing majority. As Gibson and Nelson conclude in their comprehensive study, "competitive elections, in which incumbents are relatively more commonly defeated, can lead to increased turnover on a court. As a result, judges whose attitudes are more aligned with public opinion are elected, replacing judges who may be out of step with the public."⁹⁸

Judges who do not stand for election, as well as judges who compete in retention elections, are relatively more likely than judges chosen via competitive elections to issue rulings exhibiting independence from the governing majority. This is in part because incumbent judges are rarely defeated in retention elections.⁹⁹ These defeats are not unprecedented. Three of the judges on the Iowa Supreme Court who took part in a unanimous 2009 decision recognizing a right to same-sex marriage were unseated in retention elections held in 2010.¹⁰⁰ Also in recent decades, voters rejected judges after they issued rulings seen as insufficiently supportive of the death penalty, leading to the defeat of three California judges in 1986 and a Tennessee judge in 1996.¹⁰¹ Voters also defeated a Nebraska judge in 1996, in part because the judge was seen as insufficiently supportive of legislative term limits.¹⁰² However, compared with partisan and non-partisan elections, retention elections produce fewer incumbent defeats. The comparatively low rate of incumbent rejections in retention elections and in appointment systems reduces the incentive for judges in these states to be responsive to the public and also limits the efficacy of mechanisms by which judges might be held accountable for issuing decisions out of step with public

97. CHRIS BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 84, tbl 4.4 (2009) (showing that between 1990 and 2004, 31.4 percent of incumbents were defeated in partisan elections, 5.2 percent of incumbents were defeated in non-partisan elections, and 1.3 percent of incumbents were defeated in retention elections).

98. GIBSON & NELSON, *supra* note 90, at 194.

99. Devins, *supra* note 9, at 1661.

100. John F. Kowal, *Judicial Selection for the 21st Century*, BRENNAN CENTER FOR JUSTICE 12 (2016) <https://perma.cc/ES6T-Z5SB>.

101. *Id.* at 10.

102. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1134 (1997).

opinion.¹⁰³ The low rate of incumbent rejections in these states also increases the prospects that judges will remain in office even after shifts have occurred in a state's governing coalition, thereby resulting in a mismatch between the state supreme court and the governing coalition.¹⁰⁴

Judges are also more likely to exercise independence from the current governing majority when the two parties are relatively evenly matched in a state's electoral politics. In states where either party stands a chance of winning statewide elections and where control of statewide offices can shift on a regular basis, there is a greater chance of a mismatch between the supreme court and the current governing coalition. As Neal Devins has argued, there are "fairly few cases in red and blue states where the state supreme court and the dominant political coalition will be out of sync with each other."¹⁰⁵ Consequently, there will in these states be "few cases where state supreme courts will want to slap down the dominant political party through expansive interpretations of state constitutions."¹⁰⁶ In the current polarized era, "the states where there is likely to be a disjunction between the legal policy preferences of state supreme court justices and state lawmakers and governors are purple states."¹⁰⁷

The influence of state judicial selection and retention processes on state court decision-making in abortion cases can be assessed by considering which state supreme courts after *Roe* invalidated restrictive abortion policies and which selection and retention systems have been in place in those states. Supreme courts in 14 states issued rulings invalidating restrictive abortion policies during this time.¹⁰⁸ These rulings have been issued in only one state (West Virginia) that relied at the time primarily on partisan judicial elections.¹⁰⁹ Rulings of this kind were issued in three states (Minnesota, Montana, and Washington) that operate non-partisan judicial elections. The other ten states where state supreme courts have invalidated restrictive abortion policies either hold retention elections (Alaska, Arizona, Califor-

103. This conclusion is consistent with the conclusions of various studies, whether focusing on judicial decision-making generally or focusing on abortion rulings in particular. Brace et al., *supra* note 95, at 1271, 1281–83. However, it should be noted that one study focusing on state court rulings in abortion cases found that judges who run in retention elections are just as likely as judges who run in non-partisan elections (and even more likely than judges who run in partisan elections) to issue rulings congruent with public opinion. Canes-Wrone et al., *supra* note 95, at 229.

104. GIBSON & NELSON, *supra* note 90, at 194.

105. Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 *RUTGERS L. REV.* 1129, 1164 (2019).

106. *Id.*

107. *Id.*

108. Data drawn from each of the state supreme court rulings invalidating restrictive abortion policies discussed in § I-A of this Article.

109. At the time that the West Virginia Supreme Court invalidated a restriction on public funding of abortion in a 1993 ruling, West Virginia still operated partisan elections, before eventually switching to non-partisan elections in 2015.

nia, Florida, Iowa, Kansas, New Mexico,¹¹⁰ and Tennessee) or do not hold elections (Massachusetts and New Jersey). Another way of putting things is that during the *Roe* era, state supreme court decisions invalidating restrictive abortion policies were issued in 14 percent of the states that rely on partisan elections (one of the seven states operating such a system), in 21 percent of the states that hold non-partisan elections (three of the fourteen states with such a system), in 47 percent of the states holding retention elections (eight of the seventeen states holding such elections), and in 17 percent of the states that do not hold elections (two out of the twelve states). These data and patterns—especially the relative lack of such rulings issued by courts in states operating partisan and non-partisan elections—are generally consistent with the conclusions of other scholars who have studied state court decision-making.¹¹¹

Up to this point, the analysis has focused on the effect of selection and retention processes; however, life tenure and its absence have also been shown to affect state judges' willingness to invalidate policies. Brace, Hall and Langer, in their study of state court abortion decisions, found that "life tenure emerges as a significant . . . influence on judicial decisionmaking" and that judges serving for life are more likely than other judges to overturn statutes.¹¹² As they write, "judges enjoying life tenure are less constrained in their decisionmaking than other judges and are very likely to engage more freely in the countermajoritarian function."¹¹³

The relatively rapid turnover in state courts' composition as a result of elections and the absence of life tenure has still another effect on state court decision-making. To the extent that state supreme courts issue rulings protecting abortion rights and invalidating restrictive abortion policies, these rulings are susceptible to reversal by a reconstituted court with a different ideological leaning, and to a greater degree than when the U.S. Supreme Court issues rights-protective rulings. Certainly, reversals of rights-protective rulings are possible at the federal level, as seen with *Dobbs* overturning *Roe*. However, this is an exceptional case at the federal level. Moreover, the reversal took nearly a half century to achieve and came about only after U.S. Supreme Court vacancies from the 1980s through 2020 were eventually filled in sufficient numbers by Justices who opposed *Roe* and were

110. New Mexico, it will be recalled, requires judges to run in partisan elections after their first appointment but then holds retention elections for all subsequent reappointments.

111. See Devins, *supra* note 9, at 1676 (noting that between 1993 and 2009 supreme courts in seven states issued rulings recognizing a right to same-sex marriage or civil unions, and none of these states operated partisan or non-partisan elections).

112. Brace et al., *supra* note 95, at 1294.

113. *Id.*

willing to overturn it.¹¹⁴ By contrast, state courts' ideological composition can shift much more abruptly, leaving rights-protective rulings more susceptible to reversal.¹¹⁵

Consider Iowa, where the state supreme court issued a five-two decision in 2018 recognizing a right to abortion grounded in the state constitution's equal privileges or immunities clause and invalidating a law providing for a mandatory waiting period.¹¹⁶ Over the next several years, Iowa Republican Governor Kim Reynolds had an opportunity to replace four of the court's seven judges, including three who were part of the majority in the 2018 decision.¹¹⁷ After the Iowa legislature reenacted a mandatory waiting-period law and this policy was challenged, the newly constituted Iowa Supreme Court issued a decision in June 2022, a week before the U.S. Supreme Court's *Dobbs* decision, holding by a five-two margin that the court's 2018 decision should be overturned and declaring that the state constitution does not protect the right to an abortion.¹¹⁸

C. *The Role of State Courts After Dobbs*

Pulling together the various strands of this analysis, several points can be advanced about the role of state courts in protecting abortion rights after *Dobbs*. First, state courts have shown an ability and willingness, prior to *Dobbs*, to invalidate restrictive abortion policies by drawing on state constitutional provisions, and they can be expected to continue issuing rulings of this kind after *Dobbs*. However, compared with the U.S. Supreme Court, state courts are less inclined to invalidate policies supported by the public and public officials because of the prevalence of judicial elections, particularly the heavy reliance on partisan and non-partisan elections, and because judges in all but one state lack life tenure. Finally, although state courts are generally less inclined than the U.S. Supreme Court to exhibit independence from the governing majority, certain state courts are more likely to issue rulings blocking restricting abortion policies. These rulings are more

114. David M. Konisky & Paul Nolette, *The State of American Federalism 2021–2022: Federal Courts, State Legislatures, and the Conservative Turn in the Law*, 52 *PUBLIUS* 353, 356–57 (2022); Lawrence Hurley, *Analysis: Trump's Justices Decisive in Long Campaign to Overturn Roe v. Wade*, *REUTERS* (June 24, 2022) <https://perma.cc/HV88-9FJ3>.

115. Devins, *supra* note 105, at 1171 (noting that in 2017 the Florida Supreme Court issued a ruling blocking enforcement of a waiting-period law, but after Republican Ron DeSantis won the 2018 gubernatorial election he was able to quickly appoint three new state supreme court judges and did so in part with the intent of rolling back this state supreme court decision and others).

116. *Planned Parenthood of the Heartland v. Reynolds*, 915 N.W.2d 206, 244–46 (Iowa 2018).

117. Devins, *supra* note 105, at 1170; Robin Opsahl & Jared Strong, *Iowa Supreme Court Erases State Constitutional Right to Abortion*, *IOWA CAPITAL DISPATCH* (June 17, 2022) <https://perma.cc/3BSL-3NAU>.

118. *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710 (Iowa 2022).

likely to be issued by judges who do not have to stand for election or who participate in retention elections rather than competitive elections, by judges who enjoy life tenure or serve long terms rather than short terms, and by judges in states where the parties are relatively evenly matched as opposed to one party enjoying clear dominance.

II. STATE CONSTITUTIONAL AMENDMENTS

Another consequence of shifting authority for abortion policymaking from the federal to the state level is increasing the role and importance of constitutional amendments. When the boundaries of permissible abortion policies are determined primarily by U.S. Supreme Court rulings interpreting the U.S. Constitution, abortion-rights supporters and opponents expend little energy trying to amend the U.S. Constitution. By contrast, when the scope of abortion rights rests largely on the meaning of state constitutional provisions, groups looking to influence abortion policy devote significant attention to amending state constitutions, aiming, at times, to provide more explicit textual grounding for abortion rights and trying, at other times, to limit recognition of abortion rights.

A. *State Constitutional Amendment Processes*

The Article V federal amendment process erects high hurdles to amending the U.S. Constitution. As a result, groups seeking to influence the level of protection for abortion rights, or other rights, do not view amending the U.S. Constitution as a viable strategy. To be sure, from the early 1970s through the early 1980s, members of Congress who opposed the Supreme Court's *Roe* ruling introduced a number of federal constitutional amendments with an eye to combating the effects of the ruling.¹¹⁹ Some of these amendments, including amendments supported by North Carolina Republican Senator Jesse Helms and New York Conservative Senator James Buckley, were framed as personhood amendments and would have rendered most abortions illegal.¹²⁰ Other amendments, including the only amendment to advance to a vote on the Senate floor, in 1983, would have declared that the right to abortion is not protected by the U.S. Constitution, thereby giving full discretion to Congress and state governments to enact policies regulating abortion.¹²¹ However, even supporters of this 1983 amendment, sponsored by Utah Republican Senator Orrin Hatch and Missouri Demo-

119. EDWARD KEYNES & RANDALL K. MILLER, *THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION* 280–85 (1989).

120. DANIEL K. WILLIAMS, *DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE ROE V. WADE* 213 (2016).

121. KEYNES & MILLER, *supra* note 119, at 281–82.

cratic Senator Thomas Eagleton, acknowledged that it stood little chance of securing the requisite support from 67 of the 100 Senators.¹²² In fact the proposed amendment fell well short of that mark, failing, just barely, to gain the support of a majority of senators voting on the measure.¹²³ Since this amendment failed to advance out of Congress, no other significant efforts have been devoted to passing abortion-related federal amendments. Instead, groups turned their attention primarily to influencing the composition of the U.S. Supreme Court,¹²⁴ because of the difficulty of securing support for an amendment from two-thirds of the members in both houses of Congress and ratification by three-fourths of the state legislatures.¹²⁵

State constitutions are easier to amend and are amended much more frequently than the U.S. Constitution.¹²⁶ Although the U.S. Constitution has been amended 27 times in 235 years, an average of roughly once per decade, the average state constitution is amended around once per year.¹²⁷ States exhibit wide variation in amendment frequency. Some state constitutions are amended quite frequently. Others are amended less often.¹²⁸ But every state constitution is amended more often than the U.S. Constitution, including Vermont's constitution, which is the least frequently changed constitution and is still amended on average once every four years.¹²⁹

A key factor contributing to the relative frequency of state constitutional amendments is that it is generally easier for state legislatures to approve a state constitutional amendment than for Congress to approve an amendment to the U.S. Constitution.¹³⁰ In twenty states, legislatures have to meet the same two-thirds requirement to advance state constitutional amendments that is required for Congress to advance federal amendments.¹³¹ But thirty states set a lower threshold. It is sufficient in these states to obtain the support of three-fifths or a bare majority of legislators to

122. Steven V. Roberts, *Full Senate Gets Abortion Measure*, N.Y. TIMES (April 20, 1983) <https://perma.cc/PYX2-HD7C>.

123. The amendment secured 49 votes in its favor, as opposed to 50 votes against it. KEYNES & MILLER, *supra* note 119, at 283.

124. WILLIAMS, *supra* note 120, at 245–46; MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* 73–74 (2020).

125. NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE* 89 (1996). To the extent that groups and congressmembers propose federal constitutional amendments it is for the purpose of position-taking rather than actually seeking enactment of these amendments. See Stephan Stohler et al., *Judicial Power and the Shifting Purpose of Article V* (pt. 2), 36 *STUD. AM. POL. DEV.* 84 (2022).

126. DINAN, *supra* note 41, at 30.

127. *Id.* at 23.

128. *Id.* at 25–26.

129. *Id.* at 26.

130. *Id.* at 15.

131. *Id.* at 14, tbl. 1.1.

place amendments on the ballot, though some of these states require legislative approval in two separate sessions.¹³²

The vast majority of states also provide a relatively easy path to ratifying legislature-referred amendments, generally permitting amendments to be ratified by a simple majority of voters.¹³³ Delaware is unique in not giving voters an opportunity to ratify amendments; amendments in Delaware take effect after securing the requisite legislative support in two sessions.¹³⁴ On the other hand, three states require amendments to be supported by a supermajority of voters (a two-thirds threshold in New Hampshire, a 60 percent threshold in Florida, and a 55 percent threshold in Colorado).¹³⁵ A handful of states (Hawaii, Illinois, Minnesota, Tennessee, and Wyoming) require amendments to be ratified by a majority of voters participating in the entire election, so that abstentions essentially count as no votes.¹³⁶ However, all of the remaining states set a simple majority threshold for voters to ratify legislature-referred amendments.

A number of states provide additional means of advancing constitutional amendments, thereby providing a vehicle for amending state constitutions even when legislative support is lacking. Most importantly, eighteen states allow citizens to initiate amendments by securing a certain number of signatures in support of an amendment proposal and thereby placing it on the ballot.¹³⁷ In most states that permit citizen-initiated amendments, all that is needed to ratify these amendments is the support of a simple majority of voters.¹³⁸ As with legislature-referred amendments, some states set a higher threshold, requiring support from a supermajority of voters (as in Colorado and Florida), requiring support from either a supermajority of voters or a majority of voters in the election (in Illinois), requiring citizen-initiated amendments to be approved by voters in two consecutive elections (in Nevada), or requiring a certain level of support from legislators before the amendment can be voted on by the people (in Massachusetts).¹³⁹ In general, though, the availability of citizen-initiated constitutional amendment

132. *Id.*

133. The information in this paragraph is drawn from DINAN, *supra* note 41, at 13, 15.

134. *Id.* at 13.

135. *Id.* at 15.

136. Illinois permits amendments to be ratified if they secure support from three-fifths of persons voting on the amendment or a majority of persons voting in the election. *Id.* at 13, 15.

137. *Id.* at 16–18. This count of eighteen states providing for initiated constitutional amendments includes Mississippi, even though the Mississippi supreme court in May 2021 ruled that the initiative process can no longer be used until the rules are updated to take account of a change in the number of the state's congressional districts. Initiative Measure No. 65: Mayor Butler v. Watson, 338 So. 3d 599, 615 (Miss. 2021). The constitutional initiative process is therefore not currently available in Mississippi, but it has been available until recently and is expected to become available once again.

138. DINAN, *supra* note 41, at 18.

139. *See generally Id.* at ch. 1.

processes in one-third of the states offers yet another reason why amendments are advanced and ratified on a regular basis in the states.

B. State Constitutional Amendments and Individual Rights

The relative accessibility of state constitutional amendment processes leads groups and officials at the state level to view amendments as a viable way of adjusting the level of protection for various rights. As a result, rights-related amendments are considered and approved on a regular basis and for a variety of purposes.¹⁴⁰

In one set of cases, groups secure passage of amendments expanding protection for rights in advance of and beyond the level of protection afforded by judicial decisions.¹⁴¹ In recent decades, supporters of crime victims' rights, religious freedom, and search-and-seizure protections, among other rights, have sought to expand protection of these rights by passing amendments that add or revise state constitutional provisions.¹⁴²

In a second, very different, set of cases, groups advocate for passage of constitutional amendments preventing state courts from issuing rights-expansive rulings.¹⁴³ State constitutional amendments cannot provide less protection for rights than is guaranteed by the U.S. Constitution. However, when state courts interpret state constitutional provisions as affording greater protection for rights than the U.S. Constitution guarantees, amendments can make clear that state constitutional provisions should be read no more broadly than similar language in the U.S. Constitution, thereby overriding state court rulings to the contrary. For instance, when state courts have relied on state constitutions to abolish or limit use of the death penalty, groups supporting capital punishment have at times pushed for enactment of state constitutional amendments stipulating that the state constitution does not foreclose the death penalty.¹⁴⁴ Meanwhile, until the U.S. Supreme Court declared a federal constitutional right to same-sex marriage in its 2015 *Obergefell* ruling,¹⁴⁵ state constitutional amendments were enacted in a majority of states for the purpose of declaring that the right to same-sex marriage is not protected by the state constitution.¹⁴⁶ Still other court-constraining constitutional amendments have been enacted in response to and

140. John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2110 (2013).

141. John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 38–41 (2016).

142. DINAN, *supra* note 41, at 75, 81, 88–89, 91, 94–95, 97–98, 101–03.

143. *Id.* at 111.

144. *Id.* at 128–31.

145. *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

146. DINAN, *supra* note 41, at 138–43.

with an eye to overturning state court decisions expanding protection for certain rights of criminal defendants.¹⁴⁷

C. Amendments Protecting Abortion Rights

Prior to *Dobbs*, amendment processes were not a vehicle for abortion-rights supporters to enact provisions explicitly protecting abortion rights, but after *Dobbs* these kinds of amendments were placed on the 2022 ballot in three states and are likely to be considered on a regular basis in future years.¹⁴⁸ Vermont legislators, who began the work of proposing an amendment several years before *Dobbs*, and California legislators, who were spurred to action in the weeks prior to and after the *Dobbs* ruling, placed amendments on the 2022 ballot that provide explicit protection for “reproductive autonomy” (in Vermont) and for “abortion” (in California). Vermont’s amendment states in its entirety: “That an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.”¹⁴⁹ California’s amendment provides, in part, that “The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion”¹⁵⁰ Additionally, in early 2022, while the *Dobbs* decision was being crafted, abortion-rights groups in Michigan began the work of securing signatures in support of a citizen-initiated amendment protecting abortion rights. In the weeks after the decision, they collected enough signatures to place an amendment on the 2022 ballot protecting an individual right to “reproductive freedom” and setting out detailed guidance regarding permissible and impermissible restrictions on abortion.¹⁵¹ Voters approved all three of these amendments by large margins in the November 2022 election.¹⁵²

147. *Id.* at 117–26.

148. Christine Vestal, *Abortion Advocates Aim to Outflank Lawmakers Using 2024 Ballot Measures*, STATELINE (Nov. 23, 2022), <https://perma.cc/FSB3-TGTL>.

149. *Vermont Proposal 5, Right to Personal Reproductive Autonomy (2022)*, BALLOTEDIA, <https://perma.cc/A4FF-ET69>.

150. *California Proposition 1, Right to Reproductive Freedom Amendment (2022)*, BALLOTEDIA, <https://perma.cc/G38H-Q6UH>.

151. *Michigan Proposal 3, Right to Reproductive Freedom Initiative (2022)*, BALLOTEDIA, <https://perma.cc/73ET-S8AM>.

152. Voters approved the Vermont amendment, with nearly 77 percent of voters supporting the amendment. *Vermont Proposal 5, Right to Personal Reproductive Autonomy (2022)*, *supra* note 149. Voters approved the California amendment, with nearly 66 percent of voters supporting the amendment. *California Proposition 1, Right to Reproductive Freedom Amendment (2022)*, *supra* note 150. Voters approved the Michigan amendment, with nearly 57 percent of voters supporting the amendment. *Michigan Proposal 3, Right to Reproductive Freedom Initiative (2022)*, *supra* note 151.

The intent of enacting amendments explicitly protecting abortion rights is to provide additional support to state judges in hearing cases challenging abortion restrictions. In proposing these amendments, groups and officials are not necessarily dissatisfied with or seeking to overturn judges' interpretations of existing constitutional guarantees. Rather, the purpose is to assist abortion-rights supporters in challenging restrictive abortion measures that a future legislature might enact and guide courts in resolving these challenges.¹⁵³

D. Amendments Limiting State Courts' Ability to Protect Abortion Rights

Other abortion-related amendments serve a very different purpose of preventing state courts from issuing rulings protecting abortion rights. A half-dozen states enacted amendments of this sort prior to *Dobbs*. Similar amendments appeared on the ballot in 2022 but were rejected.

Rhode Island was the first state to adopt constitutional language limiting the ability of state courts to rely on state constitutional provisions to protect abortion rights. However, Rhode Island's provision differs in important respects from other court-constraining amendments enacted in the 21st century. Delegates working to revise Rhode Island's constitution at a 1986 convention, the last full-scale state constitutional convention held in the U.S.,¹⁵⁴ were intent on adding language guaranteeing due process, equal protection, and anti-discrimination to a longstanding section in the state's bill of rights. However, in proposing this change, delegates sought to make clear that this new language should not be interpreted as protecting abortion rights. As part of the proposal to add these new guarantees, a final sentence was therefore added stipulating that, "Nothing in this section shall be construed to grant or secure any right related to abortion or the funding thereof."¹⁵⁵ Rhode Island voters approved this amendment, one of a number

153. These purposes are noted in Peter D'Auria, *Vermont may enshrine abortion access in its constitution. But what if Congress bans it?*, VT DIGGER (June 27, 2022), <https://perma.cc/FTH8-83G3> (quoting Vermont Law Professor Peter Teachout, who explained, "Basically, it's designed to deal with the contingency of right-to-life legislation being passed by the Vermont Legislature at some point in the future.") and Rachel Bluth, *In California, abortion could become a constitutional right. So could birth control*, CBS NEWS (Aug. 4, 2022), <https://perma.cc/3LT8-EMVF> (quoting California state senate leader Toni Atkins, who explained, "We are protecting ourselves from future courts and future politicians.").

154. John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth and Twentieth Centuries*, 34 J. POL. HIST. 297, 298 (2022).

155. R.I. CONST., art. I, § 2. The entire provision now reads: "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap

of convention-referred amendments approved by voters in the 1986 election.

Other court-constraining amendments have been advanced in response to specific state court rulings invalidating restrictive abortion policies and for the purpose of declaring that the restrictions invalidated by the court are permitted by the state constitution. This is the origin of a 2004 Florida amendment explicitly authorizing the legislature to enact a law requiring that parents be notified when one of their minor children receives an abortion.¹⁵⁶ During the decade and a half leading to the passage of this amendment, Florida's legislature had sought to enact policies requiring some sort of parental involvement when minor children undergo abortions, whether by requiring parental *consent* prior to an abortion or, somewhat more modestly, requiring parental *notification* when an abortion is performed. However, the Florida Supreme Court invoked the state constitution's privacy guarantee to strike down these policies, at first in 1989 in a case concerning a parental consent law and then in another case in 2003 concerning a parental notification law.¹⁵⁷ In response, Florida legislators approved and voters in 2004 ratified an amendment authorizing the legislature to enact and enforce a parental notification requirement.¹⁵⁸ The amendment declares that:

Notwithstanding a minor's right of privacy . . . , the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.¹⁵⁹

Other court-constraining amendments contain more sweeping declarations that state constitutions do not protect abortion rights. In advancing these amendments, groups and officials are generally reacting to and seeking to reverse specific state court rulings invalidating abortion restrictions. However, rather than simply authorizing the invalidated policies, these amendments go further and make clear that no language in the state constitution should be understood as protecting abortion rights.

be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."

156. DINAN, *supra* note 41, at 136–37.

157. *In re T. W.*, 551 So.2d 1186, 1188 (Fla. 1989) (invalidating a parental-consent requirement); *N. Florida Women's Health v. Florida*, 866 So.2d 612, 615 (Fla. 2003) (invalidating a parental-notification requirement).

158. *Florida Amendment 1, Parental Notification of Abortion Measure (2004)*, BALLOTPEDIA, <https://perma.cc/7RLA-XCQU>.

159. FLA. CONST., art. X, § 22 (adopted 2004).

Tennessee voters were the first to approve an amendment of this kind, in 2014,¹⁶⁰ in response to a 2000 Tennessee Supreme Court decision interpreting various provisions of Tennessee's Constitution as protecting a right to procreational autonomy and disallowing various abortion restrictions, including waiting-period and informed-consent requirements.¹⁶¹ The intent of this Tennessee amendment, which declares in its key part that "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion,"¹⁶² is to ensure that the Tennessee Supreme Court can no longer rely on state constitutional provisions to constrain abortion policy-making.¹⁶³ West Virginia voters in 2018 approved an identically phrased amendment. West Virginia's amendment was crafted in response to and with an eye to overturning a 1993 West Virginia Supreme Court decision requiring the state's Medicaid program to cover abortions, but it goes further in declaring that nothing in the state constitution protects abortion rights.¹⁶⁴

Voters in several other states have rejected similarly framed amendments that were advanced in response to and with an eye to overturning state court rulings protecting abortion rights and invalidating abortion restrictions. In 1986, Massachusetts voters rejected a legislature-referred amendment that sought to respond to a 1981 Massachusetts Supreme Court decision recognizing a right to abortion in the state constitution and invalidating a state policy that limited public funding of abortion.¹⁶⁵ The defeated Massachusetts amendment would have prohibited the state supreme court from protecting abortion rights beyond what is guaranteed by U.S. Supreme Court rulings. The proposed Massachusetts amendment declared that:

No provision of the Constitution shall prevent the general court from regulating or prohibiting abortion unless prohibited by the United State Constitution, nor shall any provision of the Constitution require public or private funding of abortion, or the provision of services or facilities therefor, beyond that required by the United States Constitution.¹⁶⁶

160. Becky Sullivan, *With Roe overturned, state constitutions are now at the center of the abortion fight*, NPR (June 29, 2022), <https://perma.cc/Q26F-XC9D>.

161. *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 11 (Tenn. 2000).

162. TENN. CONST., art. I, § 36 (adopted 2014).

163. DINAN, *supra* note 41, at 137.

164. *West Virginia Amendment 1, No Right to Abortion in Constitution Measure (2018)*, BALLOTPEdia, <https://perma.cc/5QSL-PE8K>. The West Virginia supreme court decision that this amendment was responding to is *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993) (invalidating a policy restricting public funding of abortions).

165. The court ruling is *Moe v. Sec'y of Admin. and Fin.*, 417 N.E.2d 387, 402 (Mass. 1981). The impetus for the amendment is discussed in Sara Terry, *Abortion funding on three state ballots. Constitutional proposals have pro-choice forces concerned*, CHRISTIAN SCI. MONITOR (Sept. 19, 1986), <https://perma.cc/T4JC-G4PN>.

166. *Massachusetts Question 1, No State Constitutional Right to Abortion and Legislative Power to Regulate Abortion Amendment (1986)*, BALLOTPEdia, <https://perma.cc/8QC8-7ZCX>.

Several decades later, Florida voters rejected a 2012 amendment that sought in part to respond to a state court decision by permitting the legislature to enact not just a parental *notification* requirement, but also an even more stringent parental *consent* requirement.¹⁶⁷ However, the defeated Florida amendment swept more broadly than this in constraining all state court decision-making regarding abortion, declaring, among other things, that: “‘This constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution.’”¹⁶⁸

Most recently, voters in Kansas, in an election held a month and a half after the *Dobbs* ruling, rejected an amendment that sought to respond to a 2019 Kansas Supreme Court decision interpreting the Kansas Constitution as protecting abortion rights and enjoining enforcement of a ban on a certain second-trimester abortion procedure. With the intent of overturning the decision and preventing further decisions of this kind, Kansas legislators approved this amendment for placement on the August 2022 ballot. However, voters rejected the amendment by a wide margin.¹⁶⁹

Still other court-constraining amendments are advanced and occasionally adopted for preemptive purposes, when a state supreme court has not actually issued any rulings protecting abortion rights but groups and officials are nevertheless concerned that judges might issue such rulings in the future. To preempt rulings of this kind and insulate restrictive abortion policies from state court invalidation, groups and officials turn to the amendment process. Prior to *Dobbs*, voters in Alabama in 2018¹⁷⁰ and Louisiana in 2020¹⁷¹ approved amendments declaring that nothing in their respective state constitutions protects a right to abortion. However, in November 2022, voters in Kentucky rejected a similar amendment.¹⁷²

E. Amendments Enacting Restrictive Abortion Policies

Still another type of amendment has advanced to the ballot in some states, generally via the constitutional initiative process, for the purpose of enacting specific restrictions on abortion policies. Whereas the court-constraining amendments discussed above do not actually enact any particular

167. *Florida Amendment 6, State Constitutional Interpretation and Prohibit Public Funds for Abortions Amendment (2012)*, BALLOTPEdia, <https://perma.cc/UQ3G-RYLE>.

168. Quoted in DINAN, *supra* note 41, at 137.

169. *Kansas No State Constitutional Right to Abortion and Legislative Power to Regulate Abortion Amendment (August 2022)*, BALLOTPEdia, <https://perma.cc/H58H-LWUV>.

170. *Alabama Amendment 2, State Abortion Policy Amendment (2018)*, BALLOTPEdia, <https://perma.cc/8PAE-4WWE>.

171. *Louisiana Amendment 1, No Right to Abortion in Constitution Amendment (2020)*, BALLOTPEdia, <https://perma.cc/E4JA-TZ45>.

172. *Kentucky Constitutional Amendment 2, No Right to Abortion in Constitution Amendment (2022)*, BALLOTPEdia, <https://perma.cc/L8HC-W8GG>.

abortion regulations but rather insulate from state court reversal the regulations that legislators and citizens might choose to enact, other amendments actually adopt restrictive policies. Voters have occasionally approved these amendments but have rejected most of them.

Voters have considered several amendments limiting state funding of abortions, generally rejecting these amendments but occasionally approving them. Oregon voters rejected citizen-initiated amendment restricting public funding of abortions in 1978 and 1986 and then again in 2018.¹⁷³ In two other cases—in Colorado in 1984¹⁷⁴ and Arkansas in 1988¹⁷⁵—voters approved citizen-initiated amendments restricting public funding of abortions. These two amendments were not advanced in response to court decisions. Rather, groups supporting these restrictions relied on the citizen-initiated amendment process to adopt policies blocked by legislators but supported by the public and to insulate these policies from *legislative* reversal.¹⁷⁶

Additional amendments would have enacted other abortion restrictions but failed at the ratification stage. On multiple occasions—in 2005,¹⁷⁷ 2006,¹⁷⁸ and 2008,¹⁷⁹—California voters rejected citizen-initiated amendments that would have implemented a parental-notification requirement.¹⁸⁰

173. *Oregon Measure 7, Prohibit Public Funds for Abortions Initiative (1978)*, BALLOTPEdia, <https://perma.cc/8VAK-ANEE>; *Oregon Measure 6, Prohibit Public Funds for Abortions Initiative (1986)*, BALLOTPEdia, <https://perma.cc/MPA5-PEFM>; *Oregon Measure 106, Ban Public Funds for Abortions Initiative (2018)*, BALLOTPEdia, <https://perma.cc/NMK4-BZZF>.

174. *Colorado Initiative 3, Prohibit Public Funds for Abortions Initiative (1984)*, BALLOTPEdia, <https://perma.cc/U94C-4E4F>.

175. *Arkansas Amendment 3, Prohibit Public Funds for Abortions and State Policy Initiative (1988)*, BALLOTPEdia, <https://perma.cc/FN49-KEHC>. Voters' approval of this amendment in 1988 followed voters' narrow rejection of a similar amendment in 1986. *Arkansas Amendment 65, Prohibit Public Funds for Abortions and State Policy Initiative (1986)*, BALLOTPEdia, <https://perma.cc/P3YB-33YL>.

176. These amendments, which prohibited funding of abortions except when they might be necessary to preserve the life of the mother, were challenged in federal court in the mid-1990s on the ground that they were inconsistent with the version of the federal Hyde amendment in place from 1993 onward that provided additional exceptions (in cases of rape and incest) to the general ban on public funding of abortions beyond the limited exception (to preserve the life of the mother) provided for in the Hyde amendment prior to that time. Ultimately, federal courts determined that the amendments were preempted to the extent that they were inconsistent with the current version of the Hyde amendment. See DINAN, *supra* note 41, at 333 n.161.

177. *California Proposition 73, Parental Notification of Abortion Initiative (2005)*, BALLOTPEdia, <https://perma.cc/W8MW-8EEH>.

178. *California Proposition 85, Parental Notification of Abortion Initiative (2006)*, BALLOTPEdia, <https://perma.cc/59LC-6UTN>.

179. *California Proposition 4, Parental Notification of Abortion Initiative (2008)*, BALLOTPEdia, <https://perma.cc/V9YQ-4GW7>.

180. These amendments were responding to a California Supreme Court decision that in 1997 invalidated a parental-notification requirement. *Am. Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 800 (Cal. 1997). However, rather than merely authorizing the legislature to re-enact such a requirement, these proposed amendments would have actually implemented this requirement. See DINAN, *supra* note 41, at 136.

Amendments banning nearly all abortions have frequently advanced to the ballot but were invariably rejected. Rhode Island voters were the first to consider, and reject, such an amendment, which was placed on the ballot by a state constitutional convention in 1986.¹⁸¹ Oregon voters rejected a similar amendment in 1990,¹⁸² followed by Arizona voters who rejected such an amendment in 1992.¹⁸³ More recently, voters defeated personhood amendments declaring that life begins at conception in Colorado on three occasions (in 2008, 2010, and 2014) and in Mississippi in 2011 and North Dakota in 2014.¹⁸⁴

F. State Constitutional Amendments After Dobbs

The main lesson to be drawn from reviewing state constitutional amendments and abortion policymaking is that amending state constitutions is a meaningful option for groups and officials seeking to shape abortion policy at the state level. This stands in contrast with the federal level, where the rigidity of the federal amendment process discourages groups and officials from trying to amend the U.S. Constitution and leads them to focus nearly their entire attention on influencing the U.S. Supreme Court. Amending state constitutions is easier than changing the U.S. Constitution and occurs on a much more regular basis. Prior to *Dobbs*, voters in a half-dozen states approved amendments adjusting the level of protection for abortion rights, in each case limiting state courts' ability to protect abortion rights. In elections held in 2022 after *Dobbs* was decided, voters in two states rejected amendments limiting state courts' ability to protect abortion rights, while voters in three states approved amendments providing explicit protection for abortion rights. In the years after *Dobbs*, amendments adjusting the level of protection for abortion rights are likely to be proposed on an even more frequent basis, with an increasing emphasis on expanding, rather than limiting, protection for abortion rights.

III. STATE LAWMAKING

Another consequence of shifting most abortion policymaking from the federal government to state governments is to increase the role and importance of lawmaking processes. During the half century when the U.S. Supreme Court interpreted the U.S. Constitution as protecting abortion rights,

181. *Rhode Island Question 14, Constitutional Right to Life and Abortion Prohibited Amendment (1986)*, BALLOTEDIA, <https://perma.cc/U8KW-UGZF>.

182. *Oregon Measure 8, Abortion Ban Initiative (1990)*, BALLOTEDIA, <https://perma.cc/L2G2-JJ6A>.

183. *Arizona Proposition 110, Abortion Ban and Prohibit Public Funds Initiative (1992)*, BALLOTEDIA, <https://perma.cc/C8D5-P2WA>.

184. DINAN, *supra* note 41, at 134.

Congress devoted relatively little time to enacting laws regulating abortion, whether for the purpose of protecting or restricting abortion rights.

Certainly, Congress has engaged in extended debate about whether to restrict federal funding of abortion.¹⁸⁵ From 1976 to the present, Congress adopted and repeatedly renewed support for the Hyde Amendment, the most well-known of these restrictions, which prohibits the Medicaid program from funding abortions, except in limited circumstances.¹⁸⁶ Congress has also debated and in a number of cases enacted riders to other appropriations bills restricting federal funding of abortions.¹⁸⁷

Aside from these frequent debates about whether to limit federal funding of abortion, Congress has enacted few laws regulating abortion. In 1994, Congress passed the Freedom of Access to Clinic Entrances Act, which sought to protect individuals from intimidation or violence when they were trying to gain access to abortion facilities.¹⁸⁸ Congress also enacted the 2002 Born-Alive Infants Protection Act¹⁸⁹ as well as the 2003 Partial-Birth Abortion Ban Act.¹⁹⁰ In various other cases when Congress has considered passing more sweeping abortion-related bills, whether protecting abortion rights or restricting abortion access, these measures have sometimes passed the House but failed to emerge from the Senate. This was the fate of Republican-backed bills in 2013,¹⁹¹ 2015,¹⁹² and 2017¹⁹³ barring abortions after 20 weeks, as well as Democratic-backed bills in 2021¹⁹⁴ and in 2022¹⁹⁵ guaranteeing access to abortion and preempting restrictive state laws.

185. RAYMOND TATALOVICH & BYRON W. DAYNES, *THE POLITICS OF ABORTION: A STUDY OF COMMUNITY CONFLICT IN PUBLIC POLICY MAKING* 186 (1981) (concluding that “Congress’s control over public funding remains its principal response to abortion.”); EVA R. RUBIN, *ABORTION, POLITICS, AND THE COURTS: ROE V. WADE AND ITS AFTERMATH* 146 (1982) (noting that “attempts to limit abortion by federal statute” have to be made “by indirection, since the Constitution gives Congress no direct constitutional authority to pass laws controlling abortion,” and as a result, “one of the main strategies of antiabortion activists was to attach riders to various federal health programs and appropriations bills to prohibit the spending of any funds for abortion.”).

186. CRAIG & O’BRIEN, *supra* note 3, at 118–36.

187. For a sample of the abortion-restrictive appropriations riders enacted by Congress, *see Id.* at 112–13.

188. 18 U.S.C. § 248 (2022).

189. 1 U.S.C. § 8.

190. 18 U.S.C. § 1531.

191. Kathryn Smith and Ginger Gibson, *House Oks 20-week abortion ban bill*, POLITICO (June 18, 2013), <https://perma.cc/5YQV-SMTF>.

192. Emmarie Huetteman, *House approves revised measure banning abortions after 20 weeks*, N.Y. TIMES (May 13, 2015), <https://perma.cc/AQ7X-PJ9S>.

193. Jennifer Haberkorn, *Senate defeats Trump-backed 20-week abortion ban*, POLITICO (January 29, 2018), <https://perma.cc/ZX9A-JJ3N>.

194. Deepa Shivaram, *A bill to codify abortion protections fails in the Senate*, NPR (May 11, 2022), <https://perma.cc/8T8W-EZG5>.

195. Farnoush Amiri and Mary Clare Jalonick, *House votes to restore abortion rights, Senate odds dim*, ASSOCIATED PRESS (July 15, 2022), <https://perma.cc/62LE-X6JB>.

Congress's limited role in enacting abortion policies is attributable to several factors. To some extent, it is due to uncertainty about whether Congress has the authority to legislate in this area. For the most part, though, the absence of congressional lawmaking is a product of party competitiveness and supermajority legislative rules that make it difficult for members of Congress to reach agreement on enacting significant changes in abortion policy, as well as in other policy areas.

These factors limiting congressional lawmaking are generally not present at the state level. State governments possess plenary power and can legislate in any area not prohibited by federal law. Moreover, in most states one party enjoys a clear advantage in state legislatures and maintains firm control of all branches of state government. Additionally, the supermajority rules that inhibit legislating in the U.S. Senate are generally not in place in state legislatures. Finally, nearly half of the states permit citizen-initiated initiatives and referendums that make it possible to enact legislation blocked in state legislatures but supported by the public.

A. *The Plenary Power of State Governments*

One reason why lawmaking regarding abortion is more brisk at the state level than at the federal level is because state governments possess plenary power whereas the federal government can act only pursuant to the powers enumerated in the U.S. Constitution. This is not the most important factor contributing to congressional inactivity in this area. However, it is worth noting briefly, in part for the purpose of taking note of a distinctive feature of state constitutionalism and governance that contributes to the greater prominence of lawmaking at the state level compared with the federal level on abortion as well as other issues.

As the U.S. Supreme Court has made clear, Congress can only exercise powers granted by the U.S. Constitution. For much of the 20th century, including during the first two decades after *Roe*, the Court did not enforce this limitation in a meaningful fashion. From the late 1930s through the early 1990s, the Court rarely invalidated congressional statutes on the ground that they exceeded Congress's enumerated powers.¹⁹⁶ However, in

196. John Dinan, *The Rehnquist Court's Federalism Decisions*, 41 *PUBLIUS* 158, 159 (2011) (noting that "only two congressional statutes were overturned on federalism grounds in the half-century prior to Rehnquist assuming the role of Chief Justice, and both rulings were soon reversed."). In *Oregon v. Mitchell*, the Court ruled that Congress exceeded its powers pursuant to the Fifteenth Amendment when it passed the Voting Rights Act Amendments of 1970 and lowered the voting age to eighteen in state and local elections. 400 U.S. 112, 118, 130 (1970). This decision was overturned by the Twenty-Sixth Amendment the next year. In *National League of Cities v. Usery*, the Court prohibited Congress from applying minimum-wage and overtime requirements of the Fair Labor Standards Act to state governments, on the ground that this violated principles of state sovereignty, 426 U.S. 833, 852 (1976), but this ruling was reversed within a decade, in *Garcia v. SAMTA*, 469 U.S. 528 (1985).

U.S. v. Lopez,¹⁹⁷ the Court invalidated the Gun-Free School Zones Act on the ground that it exceeded congressional power and could not be upheld as an exercise of Congress's power to regulate interstate commerce, which had been viewed for some time as the equivalent of a grant of plenary power.¹⁹⁸ During the next several decades, the Court enforced limits on congressional authority in a number of cases, invalidating or limiting the reach of various statutes on the grounds that they stretched beyond various possible sources of authority located in the commerce power, spending power, enforcement power of the Fourteenth Amendment, or necessary and proper clause.¹⁹⁹

Whether Congress has the authority to enact nationwide policies regulating abortion, either by protecting or restricting access, and in ways that go beyond limiting the use of federal funds for abortion, has been the subject of much discussion.²⁰⁰ Notably, in *Gonzales v. Carhart*,²⁰¹ when the U.S. Supreme Court upheld the federal Partial-Birth Abortion Ban Act,²⁰² Justice Clarence Thomas wrote a brief concurring opinion, joined by Justice Antonin Scalia, indicating that the Court's decision to uphold the law against claims that it violated abortion rights did not resolve the question of whether Congress has the power to enact such a policy. Justice Thomas wrote, "I also note that whether the [Act] constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it."²⁰³

Questions about the scope of congressional authority to enact abortion policies continued to surface during the last decade, both regarding Republican bills to restrict abortion rights and regarding Democratic bills preempting restrictive state abortion policies.²⁰⁴ The debates have centered primarily around whether proposed congressional statutes can be seen as authorized by the commerce power, the spending power, or the Fourteenth Amendment's enforcement power. Arguments have been advanced about

197. 514 U.S. 549 (1995).

198. *Id.* at 551, 567–68.

199. Dinan, *supra* note 196, at 159 (listing a number of rulings invalidating or limiting the reach of congressional statutes and doing so on federalism grounds); John Dinan, *The U.S. Supreme Court and Federalism in the Twenty-first Century*, 49 *STATE & LOCAL GOV. REV.* 215, 220–21 (2017).

200. The argument that congressional power is broad enough to authorize passage of nationwide policies regarding abortion is advanced in, among other places, LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 191–92 (1992).

201. 550 U.S. 124 (2007).

202. *Id.* at 132, 147.

203. *Id.* at 168–69 (Thomas, J., concurring).

204. See, e.g., John Yoo, *Schumer and Graham are both wrong on abortion: Congress can't legislate it*, *WASH. POST* (September 15, 2022) <https://perma.cc/C5Y4-PAGQ>.

possible support for congressional action from each of these constitutional clauses as well as the limitations of each of these sources of authority.²⁰⁵

State lawmakers, by contrast, do not encounter similar concerns about the scope of governmental authority to enact abortion regulations, because state governments possess plenary power.²⁰⁶ Certainly, state lawmakers are limited in the policies they can enact. The federal Supremacy Clause prevents states from enacting policies prohibited by or inconsistent with the U.S. Constitution, federal law, or federal court rulings. However, state lawmakers, unlike members of Congress, need not be concerned about providing the source of authority for laws they enact, and therefore, they have wide discretion to enact abortion policies.

B. *One-Party Dominance of State Governments*

The most important factor contributing to the greater prominence of lawmaking in states compared with the federal government is that states are more politically homogeneous than the country as a whole and the balance of power in states is often lopsided in favor of one party. Although there is a tendency when focusing on partisan dynamics to explain the prominence of state lawmaking in another fashion, by viewing state legislatures as less polarized than Congress, this turns out not to be the case. After studying state legislative roll-call records and calculating levels of polarization, Boris Shor concluded that: “Most state legislatures exhibit levels of partisan and ideological conflict that are at least as high as that of the U.S. Congress. Moreover, polarization has been rising in most – but not all – state legislatures. And just as it has in Congress, partisan conflict within state legislatures has become a central feature of policymaking.”²⁰⁷ The key difference affecting policymaking in state legislatures and Congress is not that the former are less polarized but rather one party enjoys such a large advantage in most state governments that it can enact policies without regard to the minority party’s objections.

As of 2022, one party controlled both houses of the legislature in all but three states, Alaska, Minnesota, and Virginia, and generally by large margins in each chamber, in contrast with Congress, where the majority

205. A 2022 Congressional Research Service report examined this question and considered three possible sources of authority for congressional action but also noted limitations of each approach. Kevin J. Hickey & Whitney K. Novak, Cong. Res. Serv., LSB10787, CONGRESSIONAL AUTHORITY TO REGULATE ABORTION (updated July 8, 2022) <https://perma.cc/MQN8-BY4P>.

206. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 7 (1998); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 249 (2009).

207. Boris Shor, *Polarization in American State Legislatures*, in AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION 203, 204 (James Thurber and Antoine Yoshinaka, eds., 2015).

party usually enjoys a narrow margin of control.²⁰⁸ One way to contrast the narrow margins of party control in Congress with the significant advantages at the state level is to consider the share of seats held by the majority party in various chambers. In Congress, the majority party's share of seats in the House or Senate has not gone *above* 60 percent at any time in the 21st century. By contrast, in most state legislative chambers the majority party's current margin of control does not fall *below* 60 percent. In 2022, the majority party held at least 60 percent of the seats in around 70 percent of the state legislative chambers.²⁰⁹

One-party dominance of the legislature usually extends to control of the governor's office as well. Here, though, it is important to take note of some exceptional cases where one might expect, on account of one party's strength in the state overall and in the legislature, that the same party would also dominate gubernatorial elections, but this turns out not to be the case. In 2022, at the time that *Dobbs* was decided, Republicans held the governor's office in some of the more Democratic states in the country, such as Maryland, Massachusetts, and Vermont, whereas Democrats held the governor's office in several strongly Republican states such as Louisiana, Kansas, and Kentucky, thereby contributing to divided party control in these states.²¹⁰ Nevertheless, and taking full account of these notable exceptions, in 2022 only 13 states featured split party control of the legislature and governor's office.²¹¹ In nearly three-fourths of the states, one party controlled the executive and legislative branches, often by wide margins, and in a way that facilitates lawmaking.²¹²

C. State Legislative Rules

Enacting policies is easier at the state level than at the national level not only because of unified party control and one-party dominance, but also because few state legislatures operate under supermajority rules of the sort that routinely block consideration of measures in the U.S. Senate. Admittedly, some states maintain supermajority quorum requirements, require a supermajority of legislators to cut off debate, or permit speeches of unlim-

208. *2022 State & Legislative Partisan Composition*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 1, 2022), <https://perma.cc/ZER9-CYBB>. In Alaska, Republicans held a numerical majority in the house and senate, but were unable to achieve a governing majority in the house, because some of the Republican members formed a power-sharing agreement with Democratic members, resulting in divided party control of the house. *2022 Alaska legislative session*, BALLOTPEdia, <https://perma.cc/PT8N-FYAU>. It should also be noted that Nebraska has a non-partisan legislature.

209. Calculated from data presented in *2022 State & Legislative Partisan Composition*, *supra* note 208.

210. *Id.*

211. *Id.*

212. *Id.*

ited length. However, these rules are found in a limited number of states, are employed infrequently, and generally do not have the effect of blocking passage of policies supported by a majority of legislators.

State lawmaking is facilitated in part by the general absence of supermajority quorum requirements. These requirements have no counterpart in Congress; the U.S. House and Senate require a simple majority of members to be present in order for business to be conducted. But seven states currently require a supermajority of members to be able to take up business of various kinds.²¹³ Four states maintain supermajority quorum requirements for any legislative business: Indiana, Oregon, Tennessee, and Texas.²¹⁴ Another three states—New York, Wisconsin, and Vermont—require a supermajority of members to be present to undertake specific tasks such as passing a budget or raising taxes.²¹⁵

Members of the minority party have on several high-profile occasions taken advantage of states' supermajority quorum rules and left the chamber, and sometimes the state, in sufficient numbers to prevent the legislature from continuing its work and thereby block passage of policies supported by a majority of legislators. In most cases, though, the majority party was able, eventually, to enact the policies opposed by the minority, whether a congressional redistricting map in Texas in 2003, a bill making various elections changes again in Texas in 2021, or measures limiting public-sector unions' abilities to engage in collective bargaining in Wisconsin in 2011.²¹⁶ Only in a few cases, in Indiana in 2011 when a Democratic walkout blocked a right-to-work measure and in Oregon in 2019 and 2020 when a Republican walkout blocked a climate change measure, did a supermajority quorum requirement actually prevent the majority party from eventually enacting policies, and none of these cases involved abortion rights.²¹⁷

In some state legislatures, the minority party also benefits from supermajority rules for closing off debate or rules permitting speeches of unlimited length that can allow opponents of measures to run out the clock at the end of fixed-length sessions. Although estimates vary regarding the precise number of state legislative chambers that permit speeches of unlimited length or require a supermajority vote to cut off debate, the general understanding is that fewer than a dozen state legislatures allow one of

213. Peverill Squire, *Quorum Exploitation in the American Legislative Experience*, 27 *STUD. AM. POL. DEV.* 142, 146, tbl. 1 (2013).

214. *Id.* at 146.

215. *Id.*

216. *Noteworthy State Legislative Walkouts*, *BALLOTPEdia*, <https://perma.cc/8SGW-2JU2>.

217. *Id.*

these practices.²¹⁸ Moreover, even among the small number of states that formally permit filibustering of some kind, only a handful regularly feature filibusters: Alabama, South Carolina, Maryland, Nebraska, and Texas.²¹⁹

Filibusters have blocked passage of abortion policies in several of these states and have at times delayed passage of policies for several years, but in none of these states has a filibuster ultimately prevented passage of a policy that enjoyed majority support. For many years in Maryland, it took a two-thirds vote to cut off debate in the senate, before the threshold was lowered to three-fifths as a result of a 2004 rule change.²²⁰ In Maryland's 1990 legislative session, before this rule was changed, abortion rights supporters sought to enact a law guaranteeing access to abortion up to the point of fetal viability, as a backstop in case the U.S. Supreme Court overturned *Roe*.²²¹ The measure enjoyed the support of a clear majority of legislators in both houses, but advocates fell one vote shy of securing the two-thirds support needed to break a multi-day filibuster waged by senate opponents.²²² However, the 1990 election led to the defeat of several senators who took part in the filibuster and changed the political dynamics to the point that abortion rights supporters secured passage of the legislation in the 1991 session.²²³

In Texas, meanwhile, it takes a simple majority of legislators to cut off debate, but legislators can speak as long as they want if they abide by germaneness rules. Democratic state senator Wendy Davis famously took advantage of this rule in 2013 when delivering a lengthy speech defending abortion rights on the final day of a special legislative session, with the effect of preventing a vote before the session adjourned on a Republican-backed bill enacting a number of restrictions on access to abortion. In this

218. See Niraj Chokshi, *In Many State Legislatures, it Wouldn't Take Much to Make Ted Cruz Stop Talking*, WASH. POST (Sept. 25, 2013), <https://perma.cc/7LZU-CUQP>; Meghan Reilly, Conn. Off. of Legis. Res., 2009-R-0249, STATES LIMITING LEGISLATIVE DEBATE (July 8, 2009), <https://perma.cc/5XGD-UA5X>; Karl Kurtz, *Filibusters Rare in State Legislatures*, THE THICKET AT STATE LEGISLATURES (Feb. 15, 2007), <https://perma.cc/F645-FRT6>.

219. Kyle Grossman, *The Untold Story of the State Filibuster: The History and Potential of a Neglected Parliamentary Device*, 88 S. CAL. L. REV. 413, 416 n.24 (2015) (noting Alabama, South Carolina, Texas, and Nebraska as states that feature filibusters in the contemporary era). Filibusters have also been waged in Maryland. See Tim Craig, *Democrats in Md. Try to Deflate Filibuster*, WASH. POST (Dec. 30, 2003), <https://perma.cc/H6W2-5KCZ>.

220. PEVERILL SQUIRE & KEITH E. HAMM, 101 CHAMBERS: CONGRESS, STATE LEGISLATURES, AND THE FUTURE OF LEGISLATIVE STUDIES 166 n.20 (2005).

221. Eliza Newlin Carney, *Maryland: A Law Codifying Roe v. Wade*, in ABORTION POLITICS IN AMERICAN STATES, *supra* note 7 at 51, 55.

222. *Id.* at 55–56.

223. *Id.* at 56–58. The law enacted in the 1991 session differed in an important respect from the bill filibustered in 1990, in that the 1991 law included a parental-notification provision. *Id.* at 57–58.

case, the filibuster only delayed passage of the bill, which was taken up again the following month and passed in a subsequent special session.²²⁴

Supermajority cloture rules had their biggest effect on abortion policymaking in South Carolina, where it takes three-fifths of senators to cut off debate. Republicans, the dominant party in the legislature, were unable for several years in the late 2010s to secure enough votes to overcome filibusters and proceed to a vote on legislation seeking to limit access to abortion.²²⁵ Finally, Republicans gained enough seats in the 2020 election that they were able in the next legislative session to end debate and enact a restrictive abortion policy.²²⁶

Aside from the several states that maintain supermajority legislature rules and the various occasions when these rules have delayed passage of abortion policies, supermajority rules play a modest and declining role in state legislatures, in contrast with their continuing and increasing importance in the U.S. Senate.²²⁷ At the federal level, the filibuster has been responsible for blocking congressional passage of various abortion policies, including policies seeking to limit access to abortion and other policies that would protect abortion rights.²²⁸ At the state level, supermajority rules play only a modest role in delaying passage of abortion policies.

With one party firmly in control of most state governments and the minority party unable to obstruct the passage of legislation backed by the majority party, state legislatures have enacted abortion policies on a regular basis through the years. State legislatures were particularly active in enacting abortion policy changes in the several years leading up to *Dobbs* in anticipation of such a ruling.²²⁹ This burst of state legislative activity has continued in the several months after *Dobbs* was decided.²³⁰ Focusing on 2022, in states where Democrats control the legislature and either hold the governor's office or have enough votes to override gubernatorial vetoes,

224. Manny Fernandez, *Abortion restrictions become law in Texas, but opponents will press fight*, N.Y. TIMES (March 19, 2013), <https://perma.cc/BZ68-RTVZ>.

225. Tim Smith, *South Carolina abortion-ban bill dies in early morning vote, Democrats filibustered for hours*, GREENVILLE (S.C.) NEWS (May 4, 2018), <https://perma.cc/7KBU-EM5U>.

226. Jeffrey Collins, *South Carolina Senate passes bill outlawing most abortions*, ASSOCIATED PRESS (Jan. 8, 2021), <https://perma.cc/L9LE-PTBU>.

227. David J. Toscano, *Killing the Filibuster Would Kill Democracy? The States' Experiences Suggest Otherwise*, GOVERNING.COM (Dec. 23, 2021), <https://perma.cc/TU6Z-FGK6> (Noting that "Filibusters do still occur in states, but mostly are much shorter and usually do not prevent the majority from getting its way."); Jon R. Bond, Richard Fleisher, & Jeffrey E. Cohen, *Presidential-Congressional Relations in an Era of Polarized Parties and a 60-Vote Senate*, in AMERICAN GRIDLOCK: THE SOURCES, CHARACTER, AND IMPACT OF POLITICAL POLARIZATION, *supra* note 207, at 138 (noting that in the U.S. Senate, "filibusters and cloture votes have increased precipitously").

228. See Haberkorn, *supra* note 193 and Shivaram, *supra* note 194.

229. Joshua C. Wilson, *Striving to Rollback or Protect Roe: State Legislation and the Trump-era Politics of Abortion*, 50 PUBLIUS 370, 381 (2020).

230. *State Legislation Tracker*, GUTTMACHER INSTITUTE, <https://perma.cc/987K-EN53>.

policies were enacted expanding access to abortion by increasing the range of medical personnel who can perform abortions or prescribe abortion medication, as in Maryland, Delaware, and Washington state.²³¹ Meanwhile, Republican-controlled states enacted a number of restrictive abortion laws in 2022, for instance, banning nearly all abortions (in Indiana and Wyoming), banning most abortions after six weeks (Idaho), or banning most abortions after fifteen weeks (Arizona, Florida, and Kentucky).²³²

D. State-Level Direct Democracy

A final factor contributing to greater reliance on lawmaking at the state level than at the federal level is the availability of direct democratic institutions. The initiative and referendum have no counterpart at the federal level but enable voters in nearly half of the states to enact policies supported by the public but blocked for various reasons in representative institutions and overturn policies passed by the legislature but out of step with public opinion. Twenty-one states allow citizen-initiated statutes, whereby supporters of a policy initiative work to collect enough signatures to place a proposed law on the ballot and then secure its approval by voters: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming.²³³ Twenty-three states (the 21 states permitting citizen-initiated statutes as well as Maryland and New Mexico) allow citizen-initiated referenda, whereby opponents of a recently enacted state law try to collect enough signatures to force a referendum on whether to sustain or overturn the law.²³⁴ The statutory initiative and referendum have been a regular vehicle used by groups seeking to shape abortion policy, whether for the purpose of protecting or restricting abortion rights.²³⁵

On several occasions since the 1970s, abortion rights supporters have relied on citizen-initiated statutes or referenda to try to expand access to abortion.²³⁶ One approach has been to rely on the citizen-initiative process

231. *Id.*

232. *Id.*

233. *States with initiative or referendum*, BALLOTPEdia, <https://perma.cc/5P9W-NAMV>.

234. *Id.*

235. Molly E. Carter, *Regulating Abortion Through Direct Democracy: The Liberty of All Versus the Moral Code of a Majority*, 91 B.U. L. REV. 305, 312–14 (2011).

236. In focusing on ways that groups have relied on citizen-initiated statutes and referenda to protect abortion rights, I leave aside one other approach that has been taken, legislature-referred statutes. In many states, legislatures have the option of submitting proposed statutes to voters, with the proviso that the statutes will only take effect if they are approved by a majority of voters in a referendum. This is the path taken in Washington state in 1970, when the legislature approved a statute expanding abortion rights by allowing abortions to be obtained in the first four months of pregnancy and then submitted this

to place statutory changes on the ballot that legislators are not inclined to support as a way of bypassing non-responsive public officials. This approach proved unsuccessful in North Dakota and Michigan in 1972, when voters rejected initiated measures that would have expanded access to abortion until the 20-week mark at a time when this would have represented a significant liberalization of abortion policy.²³⁷ However, this approach proved successful several decades later in Washington state, where voters in 1991 approved an initiated statute guaranteeing access to abortion until the point of fetal viability, thereby ensuring that any changes in U.S. Supreme Court doctrine would leave access to abortion unaffected in that state.²³⁸

Abortion rights supporters have also relied at times on veto referenda to force a vote on statutes enacted by legislatures. Generally, when groups rely on the veto referendum device, it is for the purpose of trying to overturn laws that these groups oppose and believe to be out of step with public opinion. Abortion rights groups were unsuccessful in 1988 in overturning a Michigan law banning public funding of most abortions.²³⁹ However, groups pursued this strategy successfully in South Dakota in 2006 after the legislature that year enacted a statute banning nearly all abortions. In response, opponents secured enough signatures to force a referendum on the law and were able to overturn the policy, prevailing at the polls by a sizable margin.²⁴⁰

Abortion rights groups were also successful in employing the veto referendum device in another instance but for the very different purpose of insulating from legislative repeal a recently enacted law protecting abortion access. In 1989, the Nevada legislature enacted a statute guaranteeing access to abortion during the first 24 weeks of pregnancy, with an eye to codifying at the state level the protection currently afforded by the U.S. Supreme Court.²⁴¹ The purpose of passing the law was to guard against the chance that the Supreme Court would issue a future decision pulling back from this current level of protection. Abortion rights groups opted to force a referendum on this recently passed law at the 1990 election as a way of

measure to the public in a referendum that was approved. *Washington Referendum 20, Abortion Legalization to Four Months Measure (1970)*, BALLOTPEdia, <https://perma.cc/YX2Z-3LSM>.

237. *Michigan Proposal B, Abortion Legalization to 20 Weeks Initiative (1972)*, BALLOTPEdia, <https://perma.cc/UD38-Z3YR>; *North Dakota Measure 1, Abortion Legalization to 20 Weeks Initiative (1972)*, BALLOTPEdia, <https://perma.cc/Y25W-VDNJ>.

238. *Washington Initiative 120, Abortion Legal to Fetal Viability Measure (1991)*, BALLOTPEdia, <https://perma.cc/AE9Q-PJKL>. Discussed in Mary T. Hannah, *Washington: Abortion Policymaking through Initiative*, in *ABORTION POLITICS IN AMERICAN STATES*, *supra* note 7, 152, 153.

239. *Michigan Proposal A, Prohibit Public Funds for Abortions for Public Assistance Recipients Referendum (1988)*, BALLOTPEdia, <https://perma.cc/42EZ-22EA>.

240. *South Dakota Referendum 6, Abortion Ban Measure (2006)*, BALLOTPEdia, <https://perma.cc/QCB6-G7NC>.

241. See MICHAEL W. BOWERS, *THE NEVADA STATE CONSTITUTION* 145 (1993).

benefiting from an unusual provision in Nevada election law.²⁴² In Nevada, if a veto referendum is held and voters sustain the law in question, the legislature may not at any future time modify or repeal that law; the only way that the law can be changed is by putting the question to a subsequent popular vote.²⁴³ Abortion rights groups, in forcing a referendum on this law, intended not to overturn it but rather to entrench it against any future legislative backsliding. In a 1990 referendum, voters sustained the law by an overwhelming margin, thereby insulating it against any possibility of legislative repeal.²⁴⁴

Whereas abortion rights groups have made occasional use of the initiative and referendum and have been generally successful, abortion rights opponents have made much more frequent use of these direct democratic devices but have been almost entirely unsuccessful. On a few occasions, groups seeking to limit access to abortion relied on the initiative process to bypass resistant legislators and prevailed at the polls. The only successful initiatives of this kind dealt with requiring more parental involvement in their minor children's decision to obtain an abortion, such as when Colorado voters approved an initiative requiring parental notification in 1998²⁴⁵ and Alaska voters approved an initiative requiring parental consent in 2010.²⁴⁶

Voters defeated every other citizen-initiated statute, as well as a veto referendum, advanced by groups seeking to limit abortion access. Parental-notification initiatives were defeated in Oregon in 1990²⁴⁷ and 2006.²⁴⁸ Voters also rejected several initiatives that sought to restrict public funding of abortion in Alaska in 1982²⁴⁹ and Washington state in 1984.²⁵⁰ Voters also turned back initiatives that sought to ban "partial birth" abortions in

242. *Id.* at 145.

243. NEV. CONST., art. 19, § 19(3).

244. *Nevada Question 7, Abortion Legal to 24 Weeks Statute Referendum (1990)*, BALLOTPEdia, <https://perma.cc/4QJJ-87YL>.

245. *Colorado Initiative 12, Parental Notification of Abortion Measure (1998)*, BALLOTPEdia, <https://perma.cc/WHW5-Z5PK>.

246. *Alaska Ballot Measure 2, Parental Notification of Abortion Initiative (August 2010)*, BALLOTPEdia, <https://perma.cc/6F38-4PCM>. This initiated statute was invalidated by the Alaska supreme court in a 2016 decision. *Planned Parenthood of the Great Northwest v. Alaska*, 375 P.3d 1122, 1143 (Alaska 2016).

247. *Oregon Measure 10, Parental Notification of Abortion Initiative (1990)*, BALLOTPEdia, <https://perma.cc/E8N6-PLVG>.

248. *Oregon Measure 43, Parental Notification of Abortion Initiative (2006)*, BALLOTPEdia, <https://perma.cc/JL6E-8X72>.

249. *Alaska Measure 6, Prohibit Public Funds for Abortions Initiative (1982)*, BALLOTPEdia, <https://perma.cc/58Q6-42HR>.

250. *Washington Initiative 471, Prohibit Public Funds for Abortions Measure (1984)*, BALLOTPEdia, <https://perma.cc/W8SS-K6T3>.

1998 in Colorado²⁵¹ and Washington in 1998²⁵² and in 1999 in Maine.²⁵³ Voters also defeated initiated measures seeking to ban nearly all abortions in Wyoming in 1994²⁵⁴ and in South Dakota in 2008,²⁵⁵ and to ban abortions after 22 weeks in Colorado in 2020.²⁵⁶ Finally, abortion rights opponents secured enough signatures to force a referendum on and try to overturn a 1991 Maryland law protecting abortion up to the point of fetal viability, but these groups were soundly defeated in a referendum held the following year and the law was sustained.²⁵⁷

The availability of the statutory initiative and referendum in nearly half of the states not only provides another avenue for lawmaking when legislative action is not forthcoming but also contributes to congruence of policymaking and public opinion. After studying the fit between public opinion on abortion and state abortion policies and comparing states with and without direct democracy, Kevin Arceneaux found that “states with initiative and referenda tend to be more responsive to the average citizen’s abortion policy preferences.”²⁵⁸ As Arceneaux explained, this congruence is partly attributable to groups employing the initiative and referendum on a regular basis to enact policies that align with public opinion.²⁵⁹ However, even in states where the initiative and referendum are not employed on a regular basis, their mere presence and the threat of their use can have the indirect effect of leading governing officials to craft policies that are aligned with public preferences.²⁶⁰ Regardless of the particular mechanism by which the initiative and referendum promote congruence of public opinion and public policy regarding abortion, these devices are used on a regular basis both by groups seeking to protect and limit abortion access and with

251. *Colorado Initiative 11, “Partial-Birth Abortion Ban Act” Initiative (1998)*, BALLOTPEdia, <https://perma.cc/C3FW-BG7Q>.

252. *Washington Initiative 694, “Partial-Birth Abortion Ban Act” Measure (1998)*, BALLOTPEdia, <https://perma.cc/J747-TDJ7>.

253. *Maine Question 1, “Partial-Birth Abortion Ban Act” Initiative (1999)*, BALLOTPEdia, <https://perma.cc/KN89-CLVF>.

254. *Wyoming Initiative 1, Abortion Ban Measure (1994)*, BALLOTPEdia, <https://perma.cc/9SE5-SLG7>.

255. *South Dakota Initiative 11, Abortion Ban Measure (2008)*, BALLOTPEdia, <https://perma.cc/2Y5F-JXUN>.

256. *Colorado Proposition 115, 22-Week Abortion Ban Initiative (2020)*, BALLOTPEdia, <https://perma.cc/EXS5-YRKM>.

257. *Maryland Question 6, Changes to Abortion Law Referendum (1992)*, BALLOTPEdia, <https://perma.cc/AP9C-ZXSX>; See Carney, *supra* note 221, at 58–63.

258. Kevin Arceneaux, *Direct Democracy and the Link between Public Opinion and State Abortion Policy*, 2 STATE POL. & POL’Y Q. 372, 380 (2002). A similar finding is reported in Samantha E. Holquist, *Direct Democracy and the Politics of Abortion: Evaluating the Responsiveness of State Abortion Policy to State Abortion Attitudes*, 21 POL’Y PERSPECTIVES 60 (2014).

259. Arceneaux, *supra* note 258, at 383.

260. *Id.*

occasional success and with the effect of furthering the majoritarian character of state abortion policymaking.

E. State Lawmaking After Dobbs

State lawmaking regarding abortion was already brisk in the years prior to *Dobbs*, as legislatures as well as citizens acting through the initiative and referendum process adopted policy changes that at times restricted and at other times increased abortion access. However, prior to *Dobbs*, state lawmaking took place in the U.S. Supreme Court's shadow. The doctrines set out in *Roe* and modified in *Casey* and other rulings set the outer bounds of state policy discretion and inhibited lawmakers from taking an even more active role in crafting abortion policies. Abortion rights supporters often saw little need to enact state laws expanding access beyond what U.S. Supreme Court doctrine already required. Meanwhile, groups seeking to limit access to abortion generally saw little purpose in enacting state laws that were inconsistent with U.S. Supreme Court precedents and therefore unenforceable. Neither of these groups focused significant attention on passing legislation in Congress. A leading consequence of *Dobbs* is, therefore, to increase the prominence of lawmaking. State governments have long been free of many of the constraints that have prevented Congress from legislating in this area. But *Dobbs* removed the constraints on state policy discretion that the U.S. Supreme Court had imposed during the nearly half century after *Roe* was decided and therefore provides an additional impetus to state lawmaking.

IV. CONCLUSION

In considering *Dobbs*'s effects on the constitutional politics of abortion, one leading effect of shifting policymaking from the federal to the state level is to expand the range of institutional forums where abortion policy is made. It is not just that the focus of abortion policymaking shifts to the 50 states, with opportunities for groups and officials to influence policy in each of these states. The effects of *Dobbs* extend farther, by expanding the range of governing institutions where abortion policy is made.

A. The Effect of Dobbs on the Institutions Where Abortion Policy is Made

When the level of protection for abortion rights is determined at the federal level, efforts to influence abortion policy are devoted almost entirely to influencing the U.S. Supreme Court. The focus is placed on winning the presidency and gaining control of the Senate in preparation for any vacan-

cies on the Court and then mobilizing support for the nomination and confirmation of favorably disposed Justices.²⁶¹ Groups and officials also work to generate cases and file amicus briefs that give the Court an opportunity to reconsider prior rulings and deliver a favorable outcome.²⁶² Little energy is spent trying to amend the U.S. Constitution, on account of the rigidity of the federal amendment process. Congressional lawmaking attracts only slightly more attention. At the federal level, therefore, opportunities to influence abortion policy are directed almost entirely toward the U.S. Supreme Court and are focused especially on the judicial appointment process.

At the state level, opportunities for groups and officials to wield meaningful influence in shaping abortion policy are more numerous and varied. Certainly, courts are an important forum for influencing abortion policy at the state level no less than the federal level, and significant attention is paid to selecting state judges. However, states provide more varied and frequent opportunities for influencing the selection of state judges than are available at the federal level. In states where judicial nominating commissions play a key role in identifying a short list of candidates for appointment, citizens, groups, and officials have opportunities to influence membership of and the work of these commissions.²⁶³ In states that elect judges, opportunities abound for groups to support and oppose judicial candidates' campaigns and thereby determine the court's membership.²⁶⁴ Additionally, because judges in all but a handful of states serve fixed terms that are renewed on a periodic basis, this creates regular opportunities to alter the court's membership by unseating judges and choosing their replacements.

The most important consequence of shifting abortion policy to the states is to furnish groups and officials with additional ways of wielding meaningful influence over abortion policy other than by influencing courts. Amending state constitutions is a viable option for adjusting the level of protection for abortion rights; therefore, significant energy is dedicated to proposing and enacting abortion-related constitutional amendments and for a variety of purposes. To the extent that authority for abortion policymaking rests at the state level, this also increases the importance of lawmaking, whether through legislatures or, in nearly half of the states, through initiative and referendum processes. Enacting policy changes via legislation is possible at the state level to a greater degree than at the federal level, because states enjoy plenary rather than delegated powers and on account of

261. DINAN, *supra* note 41, at 49.

262. *See* Tushnet, *supra* note 21, at 250–51.

263. *See generally* GREG GOELZHAUSER, JUDICIAL MERIT SELECTION: INSTITUTIONAL DESIGN AND PERFORMANCE FOR STATE COURTS 18–19, 26–27 (2019).

264. *See* Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391 (2001).

one-party dominance in many states, as well as the general absence of supermajority rules in state legislatures and availability of direct democratic devices.

B. The Effect of Dobbs on the Character of Policymaking

Shifting the focus of abortion policymaking from the federal to the state level also tends to produce policies that are more responsive to public opinion, because in nearly half of the states, the public can exert direct influence in state policymaking through direct democratic institutions and because state governmental processes generally operate in a majoritarian rather than a counter-majoritarian or super-majoritarian fashion.

In one respect, it should be stressed, it is uncertain whether shifting authority for abortion policy from the federal government to the states leads to passage of policies more aligned with public opinion. In a number of states, reliance on single-member districts combined with the geographic concentration of members of the two parties and various redistricting practices result in one party enjoying majority control in state legislatures even though there is uncertainty about whether that party enjoys the support of a popular majority and even when election results strongly suggest that the other party actually commands the support of the public.²⁶⁵ However, identifying instances where one party wins a majority of votes cast in legislative elections in a state but a different party wins a majority of legislative seats represents just the starting point for comparing the majoritarian character of state and federal policymaking. What would be needed is a comparative inquiry into whether state governments are more or less susceptible to these disparate outcomes than the federal government, where similar disparities are possible when considering the number of votes cast for and seats held by the two parties in the U.S. House and U.S. Senate.

In several other respects, it is possible to conclude with more certainty that shifting authority for abortion policy to the states results in greater responsiveness of governing institutions to public opinion. Although the public has no outlet at the federal level to participate directly in shaping abortion policy, citizens have a number of opportunities to do so at the state level. Citizen influence in policymaking at the federal level takes place indirectly. Votes cast in presidential and congressional elections influence which Justices are nominated and confirmed to the U.S. Supreme Court, which policies are enacted via congressional statutes, and which constitu-

265. Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1762 (2021) (arguing that “the combination of winner-take-all elections, single-member districts, and geographically clustered populations can lead to outright minority-party control of state legislatures” and documenting cases where one party wins less than half of the votes cast for a state legislative chamber but wins more than half of the seats in the chamber).

tional amendments emerge from Congress. However, in most states, citizens have a number of opportunities to wield more direct influence in policymaking through votes cast on whether to elect or retain judges and whether to ratify constitutional amendments and, in states with direct democracy, through the opportunity to approve statutes and referenda.

Policymaking is also more majoritarian at the state level in another sense. The rules and characteristics of the judicial process, constitutional amendment process, and lawmaking process often lead to these processes operating in a counter-majoritarian or super-majoritarian fashion at the federal level, whereas these processes are generally more likely to operate in a majoritarian fashion at the state level. The U.S. Supreme Court is better positioned than most state supreme courts to act in a counter-majoritarian fashion, because U.S. Supreme Justices serve for life and are insulated from the repercussions of their rulings and are replaced infrequently, thereby increasing the prospects that the Court will act independently of the current governing majority and protect rights to a greater extent than the public and public officials are willing to support. By contrast, most state supreme court judges stand for election periodically and are replaced on a regular basis, especially in states with partisan and non-partisan elections, and their decisions are more likely to be congruent with the public and public officials.

Meanwhile, federal constitutional amendment and lawmaking processes operate according to supermajority rules that are often absent at the state level, thereby increasing the majoritarian character of these state processes. It is in no state more difficult to amend the state constitution than to amend the federal constitution. Most states set a lower threshold for legislatures to advance amendments. Some states allow citizen-initiated amendments. The vast majority of states permit ratification of amendments by a simple majority of voters. Additionally, supermajority rules that inhibit lawmaking in the U.S. Congress are only present in a few states, in the form of supermajority quorum or cloture requirements, and only occasionally serve to block passage of legislation. Finally, the availability of the statutory initiative and referendum process in some fashion in nearly half of the states provides still another means of permitting the majority to overcome minority obstructionism in a way that is not possible at the federal level, thereby offering yet another means by which shifting the focus of abortion policy to states tends to increase the majoritarian character of policymaking.

